TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914.

No. [redacted] 18

LOUIS DEJONGE & COMPANY, APPELLANT,

vs.

BREUKER & KESSLER COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FILED JANUARY 20, 1912.

(23,015)

(23,015)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 167.

LOUIS DEJONGE & COMPANY, APPELLANT,

vs.

BREUKER & KESSLER COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

INDEX.

	Original.	Print
Caption	*a*	1
Transcript from the circuit court of the United States for the eastern district of Pennsylvania	*b*	1
Docket entries	*b*	1
Bill of complaint	1	3
Exhibit A—Copyright certificate No. 13570	9	8
B—Lithograph (not set out)	10	8
C—Lithograph (not set out)	10	8
Replication	11	9
Notice of taking testimony	12	9
Evidence for complainant	13	10
Testimony of Paul Goepel	14	10
Frank Vincent Dumond	15	11
Will H. Low	27	18
Milton R. Wood	39	25
George F. Muendel	42	27
Charles W. Frazier	46	30
Henry P. Bailey	56	36
Charles Petre, Jr.	59	38
Christopher E. Raichlen	61	39
Charles B. Baldwin	63	41
Reuben Nixon Howell	65	42

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 16, 1913.

	Original.	Print
Testimony of Bernard Meyer	68	44
Henry B. Janes	71	45
Henry J. Fackiner	73	47
Alfred Dejonge	80	52
Certified copy of certificate of incorporation of Louis Dejonge & Company	84	54
Testimony of Henry A. Herbert	89	56
Charles I. McLaughlin	91	57
Copy of entries referred to by McLaughlin	99	63
Testimony of Wm. L. Drummond	103	66
Fred C. Brion	104	67
Henry B. Janes (recalled)	106	68
Henry J. Suhrbier	111	72
Examiner's certificate	113	73
Offers of exhibits	115	74
Answer	119	78
Evidence for defendant	126	79
Testimony of George A. Sook	126	79
Wm. Gesewisch	129	81
C. Horace Bowman	132	83
Harry S. C. Bacon	136	86
John M. Scherr	138	87
Walter P. Miller	141	89
Harry C. Kessler, Jr.	143	90
Jacob C. Schaut	148	93
Notary's certificate	150	95
Testimony of Clarence G. Heylmun	151	95
Examiner's certificate	160	101
Exhibits offered, &c.	161	102
Testimony of Frank Green	162	103
Notary's certificate	167	105
Exhibit—Patent for defendant's design	171	106
Exhibit—Letter from register of copyrights, January 14, 1909	173	107
Opinion	175	108
Decree	183	112
Assignments of error	183	113
Petition for appeal	185	114
Order allowing appeal	185	114
Praecipe for transcript of record sur-appeal	186	114
Citation	187	115
Clerk's certificate	188	115
Argument and submission	189	116
Opinion	190	116
Decree	193	118
Order for mandate	194	118
Notice of appeal	195	119
Petition for appeal	196	119
Order allowing appeal	197	120
Assignment of errors	198	120
Bond on appeal	200	121
Citation (copy)	201	122
Clerk's certificate	203	123

a TRANSCRIPT OF RECORD.

In the United States Circuit Court of Appeals for the Third Circuit.
October Term, 1911.

No. 1521.

LOUIS DEJONGE & COMPANY, Appellant,
v.
BREUKER & KESSLER COMPANY, Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Filed June 12, 1911.

b In the Circuit Court of the United States, Eastern District of Pennsylvania. October Sessions, 1906.

No. 1. In Equity.

LOUIS DEJONGE & COMPANY
v.
BREUKER & KESSLER COMPANY.

Docket Entries.

(Copyright.)

Goepel & Goepel.
Howson & Howson.
1
Harding & Harding.

LOUIS DEJONGE & COMPANY
v.
BREUKER & KESSLER COMPANY.

1906.
August 17. Bill of Complaint filed.
Subpœna issued returnable the first Monday of October next.
18. Motion for preliminary injunction filed.
Affidavits sur motion for restraining order and preliminary injunction filed.
Restraining order issued.

c

1906.

August 21. Bond in sum of $1000 sur restraining order approved and filed.
22. Proof of service of copy of bill of complaint &c. filed.
24. Amendment to bill of complaint filed.
25. Affidavits for complaint on motion for preliminary injunction filed.
Order of court fixing time for hearing of motion for preliminary injunction.
28. Printed copy of amended bill of complaint filed.

September 1. Messrs. Howson & Howson appear for complainant.
7. Affidavits on behalf of defendant sur motion for a preliminary injunction filed.
7. Defendant's exhibits sur motion for a preliminary injunction filed.
7. Opinion directing that upon the filing by defendant of a bond in the sum of $3,000.00 an Order shall be entered by the Clerk dissolving the Restraining Order and refusing a Preliminary Injunction.
10. Bond of defendant in sum of Three thousand dollars approved and filed.
10. Order dissolving restraining order and refusing preliminary injunction.

d

1906.

October 1. Harding & Harding appear for defendant.
1. Subpœna returned served.
November 5. Answer filed.
December 3. Replication filed.

1908.

May 27. Stipulation for withdrawal of Bond filed.
June 13. Order of court directing that Bond filed by defendant be marked "canceled" filed.

1910.

April 4. Order to place case on Argument List filed.
25. Defendant's Exhibits filed.
Testimony on behalf of defendant filed.
October 6. Complainant's prima facie testimony filed.
7. Defendant's printed record filed.
10. Argued sur pleadings and proofs.
26. Opinion, McPherson, J., dismissing bill with costs filed.
December 16. Defendant's Bill of Costs filed.
Final Decree filed.

1911.

June 5. Assignments of Error filed.
Petition for Appeal filed.

Order allowing Appeal filed.
Bond sur Appeal in the sum of Seven Hundred and Fifty Dollars filed.
Order approving Bond sur Appeal filed.
Citation allowed and issued.

1911.
June 5. Praecipe for transcript of record sur appeal filed.
June 7. Citation returned service accepted and filed.

1 United States Circuit Court, Eastern District of Pennsylvania.

In Equity.

LOUIS DEJONGE & COMPANY
vs.
BREUKER & KESSLER COMPANY.

To the Honorable Judges of the Circuit Court of the United States for the Third Circuit and Eastern District of Pennsylvania:

Louis Dejonge & Company, a corporation created and organized under the laws of the State of New York and having its office and principal place of business in the City of New York in said State, complainant in this suit, brings this its bill of complaint into this court against Breuker & Kessler Company, a corporation created and organized under the laws of the State of Pennsylvania, the defendant herein, the said defendant being engaged in business in the City of Philadelphia in the aforesaid State and Eastern District of Pennsylvania, as Lithographers, Engravers and Publishers, and thereupon
2 your orator complains and says:

That heretofore and prior to the 23d day of September, 1905, your orator was the sole proprietor of a certain painting consisting of a representation of small branches or sprigs of the flowers of holly, mistletoe and spruce arranged in the form of an open cluster, said cluster having substantially the outline of a square, which painting was the production of a citizen of the United States, and that being such proprietor your orator, before the day of publication of the said painting in this or any foreign country, duly deposited on the said 23d day of September, 1905, in the Office of the Librarian of Congress, at Washington, in the District of Columbia, a description of the said painting which said description was substantially in the words aforesaid, and also at the same time on the said last named day delivered at the said office a photograph of the said painting; that thereupon on the said last named day the said Librarian of Congress duly recorded the description of the said painting forthwith in a book kept for that purpose in the words of the paper exhibit which your orator annexes hereto marked "Exhibit A," and which it prays may be taken as a part of this bill; and that your orator at the same time last aforesaid paid to the said Librarian of Congress the sum of fifty cents for recording as aforesaid the said

title or description of the said painting, and fifty cents additional for a copy under seal of the said record, the said copy record being actually given to your orator at the said time.

And your orator shows that the aforesaid painting was the conception and production of one George F. Muendel, an artist, who was born in the United States, and on and before the aforesaid 23d day of September, 1905, and on and before the date next hereinafter named, was, and ever since has been and still is, a resident of Wyoming, in the County of Essex and State of New Jersey; and that on
3 the fifth day of May, one thousand nine hundred and five, the said Muendel in due form of law sold and assigned for a valuable consideration all his right, title and interest in and to the said painting and in and to the right to copyright the same to your orator; and your orator brings into court the aforesaid instrument of sale and assignment and prays that the same may be taken as a part of this bill.

And your orator shows unto your Honors that by reason of the premises your orator on the said 23d day of September, 1905, became and ever since has been and now is entitled to a copyright in and to the said painting, whereby and by reason of which said copyright your orator became vested for the term of twenty-eight years from and after the said last named day, to wit, from the aforesaid 23d day of September, 1905, with the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the painting aforesaid; and your orator shows that ever since the said last named day it has been and now is the sole owner and proprietor of the said copyright and of all the rights created and existing thereunder.

And your orator further shows that it has in all cases given notice of its said copyright by inscribing upon a visible portion of each one of the several copies of every edition published by it of the said painting the following words: "Copyright, 1905, by Louis Dejonge & Co."

And your orator further shows that the defendant, well knowing all the premises and the sole and exclusive rights of your orator in and to the painting aforesaid and in and to the said copyright therefor, and without the consent of your orator first obtained in writing signed in the presence of two or more witnesses, and within the aforesaid term of twenty-eight years, to wit, subsequently to the said 23d day of September, 1905, and prior to the filing of this bill, and con-
4 triving to injure your orator and to deprive it of the gains and profits which would otherwise have accrued to it, did at the City of Philadelphia, in the State and Eastern District of Pennsylvania aforesaid, engrave, etch, work, copy, print and publish the painting aforesaid, either in whole or in part, or by varying the main design, with intent to evade the law, and knowing the said painting to be so printed and published, did within the said last named period and at the said last named place and elsewhere in the United States sell and expose to sale a large number of copies of the same, all contrary to the provisions of the statutes of the United States in such case made and provided.

All of which acts and doings are contrary to equity and good conscience and tend to the manifest wrong and injury of your orator in the premises.

But your orator shows that it is ignorant and cannot set forth what number of the said copies of the said painting the defendant so printed and published and so sold or exposed to sale, and it prays, that the defendant may be required by its answer hereto to set forth in full the total number of all the said copies so printed and published and of all of the same so sold or exposed to sale by it.

And your orator further shows that the defendant has been warned to desist from its said infringement of the said copyright, and of your orator's aforesaid exclusive rights in the premises, but that it wholly refuses so to do and is still continuing its aforesaid unlawful printing and publishing and selling and exposing to sale of the said copies of the said painting, and threatens and intends to further continue the same, so that your orator will be irreparably injured by the said acts of the defendant unless it, the defendant, shall be restrained therefrom by the order and injunction of this Honorable Court.

And your orator further shows that the aforesaid acts of the defendant have the effect of inducing and encouraging other persons to infringe the said copyright and to violate the aforesaid exclusive rights of your orator in respect thereof.

And your orator further shows that the defendant has realized and received, and is at the present time realizing and receiving, from its unlawful acts aforesaid, large gains and profits which would otherwise have accrued to your orator, but to what amount your orator is ignorant and cannot set forth; and it prays that the defendant may be required to make discovery of all of its said gains and profits, and to account for and pay over all of the same to your orator.

And your orator further shows unto your Honors that since the obtaining by it of the said copyright it has expended large sums of money in preparing to print copies of the said painting, and in publishing the same, and has bestowed much time and effort in and about the making of the copies of the said painting known to the trade and to the public generally; and your orator shows that the trade and a large portion of the public have, by reason of these efforts of your orator, come to identify the copies of the said painting as the productions of your orator.

And your orator shows that a copy of its reproductions of the said painting is hereto annexed marked "Exhibit B."

And your orator further shows that the manner in which the defendant has made its aforesaid unlawful copies of the said painting has been, as shown in the annexed "Exhibit C," by adopting the general conception of the artist, employing the holly berries and mistletoe together with a substantially similar reproduction of the leaves, sprigs and clusters of the painting, and using substantially the same colors therefor as those of the painting, although introducing slightly different shades of said colors, and by following the general outline of the arrangement chosen by the artist for the vari-

ous leaves, flowers, clusters, branches and sprigs which make up the design which the artist embodied.

6 And your orator shows that a specimen of the aforesaid unlawful copies so made and sold by the defendant is hereto annexed marked "Exhibit C."

And your orator further shows that the aforesaid acts of the defendant naturally have the effect to induce the trade and purchasers to believe that the defendant may be the proprietor of the right to print and publish copies of the aforesaid painting, and the further effect to cause intending purchasers to give their orders to the defendant instead of to your orator.

And your orator further shows that all the herein aforesaid acts and doings of the defendant have caused and are causing and will continue to cause your orator great and irreparable loss and damage unless the same shall be prevented by the order and injunction of this Court.

In consideration whereof and forasmuch as your orator is remediless in the premises, except in a court of equity where such matters are properly cognizable, your orator further prays this Honorable Court as follows:

First: That the defendant may be required to make answer to all the premises above herein alleged as fully and at large as if he had been specially interrogated thereunto unto each and every thereof, even although being a corporation it be not required to answer under oath, and an answer by it and under oath being hereby expressly waived, and especially that it may answer and set forth:

1. Whether it has since the 23d day of September, 1905, and prior to the filing of this bill, engraved, printed, lithographed and published at the City of Philadelphia, in the Eastern District of Pennsylvania, copies of the aforesaid painting, which were such copies either in whole or in part, or were substantially copies thereof, or were copies which contained the general conception of the aforesaid paint-

ing although varying in some respects the main design there-

7 of, and whether during the same period and at the same place and elsewhere in the United States it has sold and exposed to sale any such copies as in this interrogatory mentioned.

2. Whether it is at the present time at Philadelphia aforesaid continuing the aforesaid engraving, printing, lithographing and publishing, and the aforesaid selling and exposing to sale of any copies of the aforesaid painting such as are referred to in the foregoing first interrogatory.

3. Whether at any time during the above mentioned period from the aforesaid 23d of September, 1905, down to the filing of this bill, it has at Philadelphia aforesaid and elsewhere in the United States, published, or sold, or exposed for sale, copies of the said printing, which copies adopted the general conception of the painting, employing the holly berries and mistletoe together with a substantially similar reproduction of the leaves, sprigs and clusters of the painting, and using substantially the same colors therefor as those of the painting but introducing slightly different shades of said colors, and which followed the general outline of the ar-

rangement shown in the painting of the various leaves, flowers, clusters, branches and sprigs.

4. Whether at any time during the said above mentioned period it has published, or sold, or exposed to sale copies of the said painting similar to the aforesaid paper exhibit hereto annexed marked "Exhibit C."

Second: That by the order and decree of this Honorable Court issuing out of and under the seal thereof, the defendant and its officers, attorneys, servants, agents and workmen, and each and every of them, may be perpetually enjoined and restrained from any further etching, working, copying, lithographing, printing and publishing of the aforesaid painting, either substan-
8 tially or in whole or in part, or by varying the main design, or copying its general conception; and also from all selling or exposing to sale any copy or copies of the said painting, or any such as aforesaid reproductions thereof which shall be in conception, design, or execution, substantially the same as the said painting in whole or in part.

Third: That your Honors will also grant unto your orator a preliminary or provisional injunction to the same tenor and effect as is hereinabove prayed in respect of said perpetual injunction; and that your orator may have such other and further relief as the circumstances of the case may require and to your Honors may seem in accordance with equity.

May it also please your Honors to grant unto your orator a writ of subpoena directed to the defendant and commanding it at a certain day and under a certain penalty therein named to be and appear in this Honorable Court, then and there to make answer hereunto and to stand, perform and abide by such order or decree made against it in the premises as shall be agreeable to equity and to your Honors shall seem meet.

And your orator will ever pray, &c.

[L. S.] LOUIS DEJONGE & CO.,
By CHAS. F. ZENTGRAF, *Pres't.*

GOEPEL & GOEPEL.
Sol'rs and Counsel for Compt., 290 Broadway, New York City.

NOTE.—The defendant is required to answer the above mentioned interrogatories numbered "1," "2," "3" and "4."

9 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Charles F. Zentgraf, of the said District, being duly sworn, deposes and says that he is the president of the above named complainant, Louis Dejonge & Company; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true to his knowledge except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true..

CHAS. F. ZENTGRAF.

Sworn to before me this 15 day of August, 1906.
[L. S.]

LOUIS LANDE,
Notary Public, N. Y. Co.

EXHIBIT A.

Class 1. XXc. No. 15570.

LIBRARY OF CONGRESS, *to wit:*

Be it remembered, That on the twenty-third of September, 1905, Louis Dejonge and Company, of New York, N. Y., have deposited in this Office the description of a painting, the description of which is in the following words, to wit:

Holly, Mistletoe and Spruce. The painting consists of the representation of small branches or sprigs of the flowers of holly, mistletoe and spruce arranged in the form of an open cluster, the cluster having substantially the outline of a square.

the right whereof they claim as proprietors in conformity with the laws of the United States respecting Copyrights.

Office of the Register of Copyrights, Washington, D. C.
[L. S.]

HERBERT PUTNAM,
Librarian of Congress.
By THORVALD SOLBERG,
Librarian of Congress,

Written M. B.
Revised L. S.
Entered L. S.
Mailed L. L.
Photograph on file (25, v, 1905—1,000).

EXHIBIT B.

The original of this Exhibit is one of the complainant's lithographed reproductions of the painting referred to in the Bill of Complaint, and is on file with the original Bill in the Clerk's Office.

EXHIBIT C.

The original of this Exhibit is one of the lithographed sheets published and sold by the defendant, and is on file with the original Bill in the Clerk's Office.

11 Circuit Court of the United States, Eastern District of Pennsylvania, October Sessions, 1906.

No. 1. In Equity.

LOUIS DEJONGE & COMPANY
vs.
BREUKER & KESSLER COMPANY.

Replication.

The Replication of the Above-named Complainant to the Answer of the Defendant.

This repliant saving and reserving to itself all and all manner of benefit and advantage of exception which may be had or taken to the manifold errors, uncertainties and insufficiencies of the said answer, for replication thereunto says that it does and will aver, maintain and prove its said bill of complaint to be true, certain and sufficient in the law to be answered unto by the said defendant; and that the answer of the defendant is uncertain, untrue, evasive and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is, and will be ready to aver, maintain and prove as this Honorable Court shall direct; and humbly prays as in and by its said bill it has already prayed.

GOEPEL & GOEPEL,
Solicitors for Complainant,
290 Broadway New York City.

12 Circuit Court of the United States, Eastern District of Pennsylvania, October Sessions, 1906.

No. 1. In Equity.

LOUIS DEJONGE & COMPANY
vs.
BREUKER AND KESSLER COMPANY.

Notice of Taking Testimony.

SIRS: Please take notice that we will proceed with proofs in behalf of the complainant in the above-entitled cause under the 67th rule of the Supreme Court for courts of equity as amended, and in accordance with the statute in such case made and provided, and in pursuance of the rules and practice of this court, orally, on Thursday, October 1st, 1908, at eleven o'clock in the forenoon

at our offices, Rooms 304 and 305, Dun Building, 290 Broadway, New York City, before F. Fisk, notary public acting as Examiner by consent, and we will call for examination Frank V. Du Mond and Will H. Low. The examination will continue from day to day until it is completed.

You are invited to attend and cross-examine if you see fit.

Dated New York, September 30th, 1908.

Yours &c.,

GOEPEL & GOEPEL,
Solicitors for Complainant.

13 To Harding & Harding, Esqs., Solicitors for Defendants, 926 Land Title Building, Philadelphia, Pa.

Circuit Court of the United States.

Eastern District of Pennsylvania, October Sessions, 1906.

No. 1. In Equity.

LOUIS DEJONGE & COMPANY
vs.
BREUKER AND KESSLER COMPANY.

Proofs for Final Hearing.

Taken on part of the above named complainant pursuant to the notice hereto annexed, at the office of Goepel and Goepel, solicitors for complainant, No. 290 Broadway in the city of New York, before Miss Fannie Fisk, a Notary Public acting as Special Examiner by consent, on Thursday, October 1, 1908.

NEW YORK, *Oct.* 1, 1908.
11 a. m.

Present:

Carl P. Goepel, Esq., one of the solicitors and counsel for complainant, and S. D. Cozzens, Esq., associate counsel.

Frank S. Busser, Esq., counsel for defendant.

14 PAUL GOEPEL, a witness produced on behalf of the complainant, having been first duly sworn, testified as follows:

Q. 1. What is your name, age, residence and profession?

A. My name is Paul Goepel; I am 64 years old, live at 2350 Seventh Avenue, New York City, and am a patent attorney.

Q. 2. Are you a member of the firm of Goepel & Goepel, solicitors for the complainant in this cause; and were you a member of that firm on the 22nd of September, 1905?

A. Yes, I am a member of the firm and was at that time.

Q. 3. I show you a certified copy of a copyright registration which I am about to put in evidence, certified by the Register of Copyrights, and ask you if you know who signed and filled up the original appli-

cation of which this is certified to be a copy, and the date when it was so signed and filled up?

A. I filled out the application on September 22, 1905, and then filed it in the office of the Register of Copyrights.

Q. 4. Can you state who signed the original application?

A. I signed the same in the name of the firm.

Q. 5. At whose request or by whose instructions did you fill up and sign the original of this paper?

A. By the instructions of Louis Dejonge & Company.

Q. 6. Can you state on what date you sent on the original to be filed in the Copyright Office at Washington?

A. On September 22, 1905, being the same date on which it was prepared.

Complainant's counsel offers the certified copy in evidence and it is marked "Complainant's Exhibit Copyright Certificate."

Q. 7. Please state whether or not when you sent on the original of this paper to be filed you sent with it any photograph and
15 any fee; if so, please state what the photograph you sent on was a photograph of, and what was the amount of the fee sent?

A. The amount of the fee was the usual $1.00 for entering the copyright and issuing the certificate. I sent the fee with the application for the copyright. The photograph sent with the application was a photograph taken from the original painting of the artist who designed the same.

No cross-examination.

Attest: PAUL GOEPEL.

FANNIE FISK,
Special Examiner.

FRANK VINCENT DUMOND, a witness called on behalf of the complainant, having been duly sworn, in answer to interrogatories propounded to him by counsel for complainant testified as follows:

Q. 1. What is your name, age, residence and profession?

A. My name is Frank Vincent Dumond; I am 43 years old; I live at 27 West 67th Street, New York, and am an artist.

Q. 2. For about how many years have you been engaged in your profession as artist?

A. For about twenty years.

Q. 3. Are you a member of any of the Academies and Associations of artists; and if so, of what Academies and what Associations, and about how many years have you been such member?

A. I am; of the National Academy of Design, having been associate member since about 1900—from 1900 to three years ago, when I became full member; have been member of the National
16 Society of Mural Painters since about 1900; member of the National Arts Club and of its Board of Governors since about 1900; also life member of the Lotos Club since about 1903. There

are other organizations of which I have been a member, having recently resigned; the Salmagundi Club of New York City and the Society of Illustrators; also have been for a number of years and still am life member of the Arts Students League and instructor in various classes there.

Q. 4. State whether or not pictures painted by yourself have been exhibited at the exhibitions of any of the Academies you have mentioned or any other Academies or Associations?

A. I have exhibited at all those mentioned, and also in all the other prominent exhibitions in the country pictures painted by myself. I ought to say that I have exhibited in all the others that I recall at the moment.

Q. 5. State whether or not you have at different times been a member of the Hanging Committees of any of the Academies which have been referred to?

A. I have, numbers of times; and was also Director of Fine Arts at the Lewis & Clark Centennial Exposition held in Portland, Oregon.

Q. 6. Have you had engagements to illustrate printed publications; and if so, please state for about how long a time you have been so engaged, and please mention some of the prominent publishers and publications for which you have done such artistic work?

A. Have been engaged in executing commissions for leading magazines and publishers during my entire career. I may cite Harper & Brothers, Century, Scribners, McClure's, as publishers of books and magazines; and have also executed many commissions for publishers of books, including such houses as Putman's, Houghton, Mifflin & Company, and many others.

Q. 7. Have any of these commissions referred to in your last answer required you to travel in order to obtain material for
17 the illustrations?

A. They have; for the execution of certain commissions and for purposes of observation and study necessary to them, I have traveled in France, Italy, and the Holy Land.

Q. 8. To what extent, if at all, have your artistic engagements included the preparing of designs for decorative purposes?

A. For the embellishment of magazine pages and purposes of mural decoration, in which all work is practically design; my studies having been partially made at the School of Design under the direction of Eugene Grasset, in Paris. My engagements have to a very great extent been decorative in character.

Q. 9. I hand you a framed painting of a design of foliation and berries and ask you to state whether or not, in your opinion, as an artist this painting can properly be termed a work of art; and please give in full your reasons for such answer as you may make?

(Counsel hands witness the painting.)

Question objected to as incompetent, irrelevant and immaterial, for the reason that the question whether or not the alleged painting submitted to the witness is a "painting," is a question of law dependant upon the purpose for which the thing in question was designed and for which it was intended to and actually was used. If

the term "work of art" is used in the legal sense, then the witness is not competent to testify thereto, as the question is one of law upon which the court is the sole judge. If the expression "work of art" is used in a general or popular sense, then the question is irrelevant and immaterial, inasmuch as a design for an article of manufacture or a chromo or a lithograph may be equally a work of art without entitling the author or inventor or designer or his
18 assignee to protect the same by registration as a painting.

A. In my opinion this is without question a work of art. My reasons for this decision are manifold, and my meaning of the term "work of art" is the only one which could possibly be used under any circumstances. The designer of the design in question has exhibited in this work knowledge of the requirements of design in the best sense of the word, and exhibits also an uncommon comprehension of the adaptation of nature to ornament. This element is one which marks not only artistic instinct, but also training. I would cite as a fine quality of this work the excellent idea of "spacing" and "massing," of juxtaposition, "balance" and relationship of colors. There is a strong sense of appreciation for bringing together variations of texture, simplicities of forms and spaces, combined with intricacies of forms and spaces, which is one of the most potent elements in successful design. I would say further that it would be impossible for any one to have created this design who had not an intimate knowledge of nature in regard to those elements of growth, contrast and harmony of color and the play of light over forms and textures which give a rather rare distinction to this work. As will be noted, the infinite variation of color obtained through the aforesaid familiarity with these things is admirably set forth in the ever changing reds of the holly berries, which catch the grey lights and the warm and cool reflections, and which run up and down the scale of lower and higher tones, thus forming a variation which may be said to have no two tones alike. The same mastery over the richness of color, obtained through the same play of lights over the glossy textures of the holly leaves, renders an infinite and most interesting charm to these. Also the use of the branches of fir with
19 their fine needles of silver green, under the same influences of light, constitutes a happy bringing together of parts which form in this design a melody much akin to the melodies of verse or of musical composition. Another point that indicates the true designer's grasp of this situation is his comprehension of the purposes for which the design might be used and its absolute fitness for these purposes. I would say still further that this design has the added charm and ring of an original creation, it bearing indisputable and wholesome evidence of its solid foundation upon the beautiful and charming side of nature. These, in my opinion, are absolute and convincing reasons for terming this design "a work of art."

Q. 10. Speaking as an artist, state whether or not in your opinion it is proper to term this work a painting; and if you answer affirmatively, please state by what mode or process the work has been executed?

Same objection as to Q. 9, and particularly that part of said objection relating to incompetency.

A. It is entirely proper to name this work a painting, it having been executed in water colors.

Complainant's counsel offers the picture in evidence and it is marked "Complainant's Exhibit Copyrighted Painting."

The offer in evidence of said exhibit is objected to for the reason that the same is obviously, upon inspection, not a painting, and is not established to be such by any competent evidence of the witness. For the same reasons objection is made to the offer in evidence of "Complainant's Exhibit Copyright Certificate," as it is obvious from an examination of the same in connection with the thing
20 purporting to have been copyrighted, that the said copyright is without legal force.

Q. 11. Will you please look at the lithographed sheet now handed you and state to what extent, if at all, in your opinion that sheet contains or embodies in whole or in part the design shown in "Complainant's Exhibit Copyrighted Painting?"

The question is objected to as incompetent even on the hypothesis that "Complainant's Exhibit Copyrighted Painting" is a painting in the sense in which that term is used in the copyright statutes, for the reason that the legal identity of a copyrighted thing and an alleged infringement thereof must be established by evidence, if any evidence be taken, of the same character as that required to establish infringement of a design patent; and that it is well established that such evidence must be that of an ordinary purchaser or general observer, and that evidence of an expert character is inadmissible. The witness has qualified as an expert within the domain of his profession as artist, and no objection has been taken to his testimony for lack of such qualifications, the very possession of which unfits him to give any competent or relevant testimony of the character of that called for by the question.

A. I would state that the lithographed sheet handed me contains and embodies all of the subject-matter shown in the "Complainant's Exhibit Copyrighted Painting." It is in my opinion a direct plagiarism of the copyrighted painting, with what is evidently an attempt through the supplementing of the detail in cones to disguise this fact. This sheet discloses also the fact that the plagiarist has
21 carefully imitated all that his untrained vision could grasp in the copyrighted painting. Like all copies, it has evidently and upon the face of it a want of that knowledge and appreciation of nature which makes it fundamental or carries its origin back to the source of all things—Nature. While it is almost an exact replica in every detail of the copyrighted painting, it still lacks that charm which suggests that it had been done by an artist or even one who is familiar with commercial design.

Q. 12. Please state to what extent, if at all, in your opinion, the

fact that the mistletoe, the holly and its berries, and the other constituent elements of the copyrighted painting, which are free to all to use, has a bearing upon what you have stated in your last preceding answer?

Same objection as to last preceding question.

A. It is well understood that nature is the common property of humanity and furnishes the motives for all creative work. The holly berries, mistletoe and all the constituent parts of this design have been used many times as appropriate symbols for Christmas designs, and will be used indefinitely for the same purposes. Original works are works which bear the evidence of having been based upon these elements as appreciated in nature, and the virtue of the design is brought about by the artist's conception of how to bring together certain phases, points of character and considerations of growth and beauty as they are revealed to him when he beholds these things in nature. As contrasted with this, unoriginal works and copies are those which have been made by men who not being familiar with these aforesaid phases and beauties of nature, draw their inspiration and their suggestion from what has been created through the genius and imagination of others. The relations of the copyrighted painting and of the lithographed sheet illustrate most aptly the foregoing.

22

Q. 13. Can you name any purpose of a decorative nature to which the design of this copyrighted painting would be applicable?

Question is objected to, unless the witness is prepared to testify that the original design in question was actually used for decorative purposes and was intended to be so used when originally produced.

A. The design of the copyrighted painting might be used for many purposes of interior domestic decoration; it might be applied to the ornamentation of fabrics for wearing apparel, for hangings, or for the embellishment of household articles on personal properties.

Q. 14. Please state whether or not your engagements as illustrator of magazines and other publications have made you familiar with the custom of the trade in such matters as respects what passes from the artist who makes designs for illustrations to the publisher or other person who gives him the commission; and if you have such familiarity, please state what is the trade custom in this respect?

The materiality of this question not being apparent to Mr. Busser, he, with consent of complainant's counsel, reserves the right to object thereto.

A. Many years of experience with commissions for illustrative work for publishers qualifies me to state that it has always been, and is, the custom for a publisher to give a commission to an artist for pictures and illustrations with the full knowledge that the artist expects to sell with the picture all claims and rights of reproduction and copyright. I have never known an instance where any question has arisen.

23

Q. 15. Please state what in your experience in doing work for decorative purposes is the trade custom in reference to what passes when that sort of design is sold by the artist to the person who gives him the commission for it?

Mr. Busser repeats the statement following Q. 14.

A. If for publication purposes, the same rule holds good. if for purposes of mural decorations, the question is decided by mutual agreement of the owner and artist. I include in the expression "publication purposes" all work done upon commission or sold for purposes of reproduction in any form.

At the request of complainant's counsel defendant's counsel admits that the lithographed sheet shown to this witness and respecting which he has testified, is a specimen sheet of the defendant's product against which this suit is brought; it being understood that defendant's counsel reserves the right to withdraw this admission at any time before the close of the proofs, in which event it is understood and agreed that complainant shall have the right to submit proof to establish the fact now admitted, with the same force and effect as if such proof were submitted as a part of complainant's opening case.

Upon this understanding, complainant's counsel at this time offers the sheet in evidence and it is marked "Exhibit Defendant's Product."

24 Cross-examination by Mr. BUSSER without waiving objections:

X Q. 16. Have you yourself ever made designs intended to be reproduced by lithography on sheets containing a number of repeats of the design?

A. I never have made designs for lithographers, nor have I made repeat designs for such purposes as the one in question.

X Q. 17. Are you sufficiently familiar with designing of the character referred to in my last question to be able to state whether the originals of such designs are usually painted in water colors and are of the same general character as "Complainant's Exhibit Copyrighted Painting?"

A. I am very familiar with designs of all characters, the one in question being merely an adaptation of the general principles of design, which are and may be executed in water colors, pastel, guache, colored charcoal drawings, or in any medium, according to the fancy of the artist or to fitness.

X Q. 18. Is it not a common characteristic of such designs intended to be reproduced by lithography on sheets containing a number of repeats of such design that opposite side edges of the design should match each with the other and the top and bottom edges of the design should match each with the other, so that when several rows of repeats of such design are printed on a sheet adjacent repeats shall merge into each other?

A. Yes.

X Q. 19. And when a design possesses the characteristics enu-

merated in my last question, namely, a matching of opposite edges, it would be evidence to your mind, would it not, that such design was intended primarily for reproduction by lithography or some analogous process?

A. It would be evidence to my mind that it had been intended for reproduction by some process.

25 X Q. 20. Please examine "Complainant's Exhibit Copyrighted Painting" and state whether same does not exhibit the characteristics referred to, namely, a matching of opposite edges?

A. Yes.

X Q. 21. Is it not a fact when a design is made with the opposite edges matching in the manner I have described, the design as a whole must be to a greater or less extent subordinated to this requirement, leaving the artist less freedom in embodying his conception than where the painting is made without reference to the possibility of such reproduction?

A. The designer never considers the limitations in the light of handicap or difficulty, but accepts them as the basis upon which originality, aptness and beauty of design are most surely to be obtained.

X Q. 22. Would it be correct to say that a designer of a design intended to be reproduced by some process upon sheets containing a number of repeats of such design, ought to bear in mind the ultimate use to which his design is intended to be put, and while not regarding the incidental limitations thereby imposed as a handicap should, in the execution of his work, embody his conception in such form that its most effective and pleasing appearance will be that which it exhibits when so repeated upon a sheet containing a number of design repeats?

A. It would be entirely correct to say that a designer should be guided by the ultimate purposes of his design. If a repeat design were to be reproduced upon sheets containing many repeats and the object were the sheets, he should make his design accordingly. If, however, the sheets were to be applied to certain other purposes of decoration, those other purposes should dictate his procedure. He should in the execution of his work find, through the requirements and limitations, the fittest means for the expression of his conception.

26 X Q. 23. Would you yourself having once seen complainant's design, if at a later date you had seen the defendant's design, be apt to confuse the two and think that it was the complainant's design. I would like a "Yes" or "No" answer to this question?

A. I should say that no confusion would be created in my mind, since the copyrighted design posseses elements of artistic merit before referred to by me, while the lithographic sheet has plagiarized its subject-matter only with the obvious intention of imitation easily discernible by people of taste.

Mr. Busser: All that part of the answer except the words "I

should say that no confusion would be created in my mind," objected to as irresponsive and volunteered.

Cross-examination closed.

Redirect examination:

R. D. Q. 24. Do you see any evidence that the artist who made the design of "Complainant's Exhibit Copyrighted Painting" was in any respect hampered in the expression of his conception by the fact that the edges of the design were to match?

A. I do not.

R. D. Q. 25. Does the fact that the edges were intended to match for any particular reason in any manner interfere with the adaptation and use of this design for the various purposes to which you have testified it is appropriate?

Objected to as leading.

A. It does not interfere in any way whatever.

Signature waived.

Attest:

FANNIE FISK,
Special Examiner.

27 WILL H. LOW, a witness called and duly sworn on behalf of the complainant, in response to questions put to him by the complainant's counsel testified as follows:

Q. 1. What is your name, age, residence and profession?

A. My name is Will H. Low; I am in my 56th year; I live in Lawrence Park, Bronxville, and am an artist.

Q. 2. For about how many years have you been engaged in this profession?

A. Since 1872.

Q. 3. Are you a member of any of the Academies and Associations of artists; and if so, will you please state what Academies and what Associations, and for about how many years you have been a member of them?

A. Yes, the Society of American Artists since 1878; the National Academy of Science since 1890; member of the National Society of Mural Painters since its foundation, and am now its 2nd Vice-President. I am also a member of the council of the National Academy of Design. I am also a member of the American Institute of Arts and Letters.

Q. 4. Will you please state whether you have been the recipient of medals or any other honorary recognitions; and if so, please mention what the same are?

A. Well, I received a medal at the Exposition Universelle of Paris in 1899. This entitles my work to be exhibited at the Salon of Paris without examination. Then I have received also a medal at the Chicago Exposition in 1893, and then a medal at the Pan-American Exposition in Buffalo. Then I was a member of the In-

ternational Jury of Awards at the Louisiana Purchase Exposition in St. Louis, in 1904.

Q. 5. About how frequently, so far as you are now able to say, have pictures painted by yourself been exhibited at any of the Academies or Associations you have mentioned, or at the Paris Salon?

28 A. I exhibited twice at the Paris Salon in my student years—'76 and '77. In the United States I have exhibited almost yearly.

Q. 6. State whether or not you have been a member of Hanging Committees and Juries of Award in connection with any of the Academies named by you; and if so, about how often?

A. Almost annually, except when I have been abroad; I mean almost annually on the Juries of the Society of American Artists, and very frequently on those of the National Academy of Design; and, as I have said before, I served on the International Jury of Awards at the Louisiana Purchase Exposition.

Q. 7. State whether or not you received any special recognition for service on this International jury; and if so, what was it?

A. Service on this jury was held to be equivalent to the reception of the Gold Medal, which in point of fact each member received, their works being exempted from other competition.

Q. 8. In the course of your artistic engagements have you or not received commissions for the execution of designs for decorative purposes; and if so, for about how long a time has this character of your work covered?

A. Almost from my earliest practice.

Q. 9. Will you mention some of the designs which you have executed for these purposes, stating in some detail what the designs were intended for?

A. In a general way, my work has always been largely decorative. I executed many mural paintings in public and private buildings, notably in the Waldorf-Astoria, New York City. Among designs more specifically intended for reproduction of a decorative character, I may mention the Official Diplomas of Award of both the Columbian Exposition, Chicago, 1893, and the Louisiana Purchase Exposition, 1904. In 1894 I designed the One-Dollar Silver Certificate for the United States Government, of which I believe

29 some 60,000,000 copies were issued. I have also designed many illustrations comprising a figure and ornament for various books and publications. Two books, issued respectively in 1885 and 1887, by J. B. Lippincott Company, of Philadelphia, were designed by me; they comprised illustrations and decorative designs for "Lamia" and the "Odes and Sonnets" of John Keats. In those two books the whole design is mine, from the cover design, the lining papers, the floral ornamentation of pages, as well as the figure compositions. The original drawings for these two books are now owned by the Art Institute of Chicago and form part of its permanent collection. I have also done similar work for almost all the New York publishers.

Q. 10. I show you a framed painting which has already been put in evidence in this cause and is marked "Complainant's Exhibit Copyrighted Painting," and ask you whether in your judgment as an artist this work can or not be properly termed a painting, and whether or not it can properly be termed a work of art; and will ask you to give your reasons in full for the answer you make?

(Counsel shows witness the picture in question.)

A. It undoubtedly is a painting, and I have no hesitation in calling it a work of art, basing my opinion upon its technical efficiency evidencing the hand of a man skilled in the use of his material, guided by the conception of his brain. This, to my mind, is evidenced by the selection of various elements of a natural order which he has grouped together in an artistic and decorative manner, with a sense of the harmony of color and a disposition of "line" and "mass" that produce upon the eye of the spectator an agreeable effect, which I hold to be the function of a work of art. In other words, it is the creation of a mind which, finding its elements in nature, combines them to produce a work of art. This requires and this painting reveals original conception.

Q. 11. By what process has this painting been produced?

A. By water color.

Q. 12. Can you mention any decorative purposes for which this work might appropriately be employed?

A. Yes; it could be appropriately used to decorate almost any plane surface that was of a character to receive an agreeable surface decoration, such as fabrics, porcelain, hangings; it can be used for lining paper for books, for which it would make a very agreeable design.

Q. 13. Please look at the lithographed sheet shown you marked "Exhibit Defendant's Product" and state whether or not in your opinion the work on that sheet embodies and contains the subject-matter of the framed painting?

(Witness is handed the sheet in question.)

A. I find them substantially identical, with certain differences which are only evident upon closer examination.

Q. 14. Please state how in your opinion the execution of the lithographed sheet compares in an artistic sense with the copyrighted painting?

A. While fairly identical to a cursory examination, closer scrutiny reveals an inferior grade of reproduction.

Q. 15. State whether or not in your opinion the fact that the copyrighted painting has been so executed that in case of repeats of it being made the opposite edges of one repeat would match with the corresponding edges of another repeat, would diminish the adaptability of the design of the painting for any of the various uses to which you have stated it is applicable?

A. I should say not. I should think it most intelligently designed, inasmuch as while complete in itself, its repetition would enhance its decorative effect.

Q. 16. Please state whether or not repetition in itself is
31 sometimes calculated and employed to heighten the effect of a decorative work?

A. Very frequently. It is in many senses the base ornament to take an agreeable unit and by its repetition produce the completed design and secure the most effective result. The repetition of the well-known Greek honeysuckle is an example of it. All schools of decorative design in all epochs have employed this method to produce the decorative effect they desired.

Q. 17. Have you present and can you produce any book which constitutes an example in your own work of the employment of this principle of repetition?

A. Yes: I have such book and produce it. In the illustrations of "In the Forest of Arden," which is the book I produce, it was desired to accentuate the sequence of the seasons. I therefore designed four decorative borders typical of spring, summer, autumn and winter. These four designs may be considered together as a unit, which, appearing from pages 3 to 6 inclusive in the book in question, are repeated in sequence through the 124 pages contained in the book.

Complainant's counsel offers this book in evidence, and it is marked "Complainant's Exhibit 'In the Forest of Arden.'"

Q. 18. Please state whether or not in your opinion this framed picture, "Complainant's Exhibit Copyrighted Painting," would, if any one desired, be applicable to use in a book?

A. Yes, as it stands it could be used acceptably for a cover or lining-paper design.

Adjourned to Friday, Oct. 2, 1908, at 10:30 A. M.

32 NEW YORK, *Oct.* 2, 1908.—10.30 a. m.

Met pursuant to adjournment.

Present: Counsel as before.

Examination of WILL H. LOW resumed:

By Mr. BUSSER: Pursuant to an agreement between counsel reserving the right to object to questions propounded to the present witness until today's meeting, Mr. Busser makes the following objections to the immediately preceding questions:

Q. 10 is objected to as incompetent, irrelevant and immaterial for the reasons specified in the objection to Q. 9 and Q. 10 of the deposition of witness DuMond.

Q. 12 is objected to as irrelevant and immaterial for the reasons set forth in the objection to Q 13 of the deposition of the witness DuMond.

Q. 13 is objected to as incompetent for the reasons set forth in the objection to Q. 11 of the deposition of witness DuMond.

Q. 14 is objected to because it is manifestly irrelevant and immaterial whether defendant's design for box-paper is, as an artistic production, a superior or inferior production to the alleged copyrighted painting.

Q. 19. I show you two catalogues, on of the Seventy-eighth Annual Exhibition of the National Academy of Design for 1903, and the other the catalogue of the Twenty-seventh Annual Exhibition of the Society of American Artists for 1905, and ask you to look at page 49 of the first of these catalogues and at page 23 of the other, at each of which pages the name of Mr. George F. Muendel appears as a picture exhibitor, and ask you to state what signification, if any, the exhibition by Mr. Muendel before these societies has in reference to his standing and character as an artist.

33

(Witness is handed catalogues named.)

Question objected to as irrelevant and immaterial, as it is not of any significance whether the originator of complainant's design is or is not an artist.

A. The acceptance in more than one instance of a picture by a given man in any one of these exhibitions would be held in a professional sense to establish his status as an artist, and by inference his general production as works of art. The method of arriving at this conclusion may be briefly indicated by the statement that each picture exhibited in these exhibitions passes before a jury of selection composed of men of the highest professional standing. In the case of the Society of American Artists this jury is composed of thirty men; in the case of the Academy, in the Exhibition of 1903 it was composed of twelve men. Each picture passes before this jury twice at intervals of several days, and its final acceptance is effected by a two-thirds vote.

Complainant's counsel offers these catalogues in evidence and they are marked "Complainant's Exhibit Exhibition Catalogues."

Q. 20. Has your experience in executing commissions for decorative work and disposing of the work when finished made you familiar with the custom of the trade in respect of what property rights in such work executed by an artist pass by his sale of the work to the person from whom he receives the commission; and if so, please state what such trade custom is?

34

The materiality of this question not being apparent to Mr. Busser, he, with consent of complainant's counsel, reserves the right to object thereto.

A. Yes, my experience dating for many years has made me familiar with the trade customs. It is rare that any formal agreement is made, and in the absence of any such formal agreement the universal custom is to concede or transfer all rights of property or copyright to the purchaser.

Direct-examination closed.

Cross-examination by Mr. BUSSER without waiving objections:

X Q. 21. If I should state to you that it has been sworn to in this case that "Complainant's Exhibit Copyrighted Painting" was produced especially to provide an artistic and attractive paper to

be used in the manufacture of boxes and other articles to be sold at Christmas and New Year's, would that affect your opinion that this exhibit is a work of art?

A. It would not.

X Q. 22. Would you go so far as to testify that original artistic and attractive designs for wall-paper, carpets, box-paper and other articles of manufacture exhibiting the degree of artistic merit possessed by "Complainant's Exhibit Copyrighted Painting," are works of art?

A. I should.

X Q. 23. Do you know Mr. Frank V. DuMond, who yesterday testified in this case?

A. I do.

X Q. 24. Mr. DuMond has testified that it is a common characteristic of designs intended to be reproduced by lithography on sheets containing a number of repeats of such design that opposite side-
edges of the design should match each with the other and
35 the top and bottom edges of the design should match each
with the other, so that when several rows of repeats of such design are printed on a sheet adjacent repeats shall merge into each other. Do you agree with Mr. DuMond?

A. In general, yes. It is an equally common practice where a design it to be repeated over a surface to obtain a decorative result by an opposition of forms; this would naturally involve a second design, though an effect of repetition is frequently obtained by reversing a given unit.

X Q. 25. Mr. DuMond has also testified that when a design possesses the characteristics enumerated in my last question, namely, a matching of opposite edges, it would be evidence to his mind that it had been intended for reproduction by some process. Do you agree with Mr. DuMond?

A. As regards the particular design before us, this fact appears to me more evident upon close examination than obvious at first sight.

X Q. 26. Have you ever seen designs other than "Complainant's Exhibit Copyrighted Painting" produced especially for application to box paper, wall-paper, carpets, hangings and other articles of manufacture; and if so, are they not sometimes painted in water colors like the complainant's design, and are they not, assuming that they possess artistic merit, works of art in the same sense and in a greater or less degree that complainant's design is a work of art?

A. I have frequently seen such designs executed in a variety of materials, but quite often in water color, and I should say that such designs, assuming that they possessed artistic merit, were to be considered works of art, and in point of fact have been so considered, notably by the International jury of the Louisiana Purchase Exposition, St. Louis, 1904.

X Q. 27. Have you yourself ever made designs intended
36 to be reproduced by lithography on articles of manufacture
containing a number of repeats of the design in question; to

illustrate what I mean by "articles of manufacture," I would mention box-paper, wall-paper, carpets, upholstery etc., as distinguished from books and illustrations having no value apart from the design of picture itself?

A. My practice has not happened to lie in the specific direction cited by defendant's counsel, though I have frequently made designs for decorative purposes where the same principle of repeated design was brought into play.

X Q. 28. You are aware, are you not, that there are many persons, some of them artists in the true sense of the word, who make pass by the designer's sale of the design to the manufacturer?

A. Naturally.

X Q. 29. Do you know of your own personal knowledge with respect to designers of the class enumerated in my last question what is the custom in respect of what property rights in such designs pass by the designer's sale of the design to the manufacturer?

A. I have no personal experience in the class of work enumerated, that is to say, box-cover, wall-paper or carpet designs; but from acquaintance with artists furnishing such designs I am in a position to state that when employed for this purpose by a manufacturer, the design and its future uses pass from the producer to the purchaser upon a sale.

X Q. 30. Mr. Du Mond has testified that the "Exhibit Defendant's Product" is in point of artistic merit much inferior to complainant's design, stating that defendant's design "lacks that charm which suggests that it has been done by an artist or even one who is familiar with commercial design." Do you agree with Mr. Du Mond?

A. Not altogether. Seeing the defendant's product for the second or third time, I am conscious of its inferior character as a
37 reproduction; seeing it for the first time yesterday morning, I was misled into thinking it the actual reproduction of the copyrighted painting.

X Q. 31. When did you first see "Complainant's Exhibit Copyrighted Painting" and "Exhibit Defendant's Product"?

A. The copyrighted painting I saw in the early part of the summer of 1908; the "Exhibit Defendant's Product" I saw yesterday morning, October 1, 1908.

X Q. 32. Did you also see the "Complainant's Exhibit Copyrighted Painting" on the morning of October first?

A. Yes, the two objects were lying in very much the same position as they are now before us.

Cross-examination closed.

Redirect examination:

R. D. Q. 33. Speaking as an artist, please state what, if any, difference you see between the reproductions of any given artistic work, such as a study or sketch, taking as one example, say, the series of pictures or designs by Mr. Gibson known popularly as "The Gibson Girl," and the reproductions of a given design in box-paper, wall-paper, carpets etc., in respect of their being articles of manufacture?

A. Speaking as an artist, I can see no difference whatsoever, except as technically one reproduction may reproduce its original with a greater or less degree of faithfulness.

R. D. Q. 34. Do you recall the various Rogers statuettes which were reproduced and sold in large numbers during the War of the Rebellion?

A. I do.

R. D. Q. 35. The reproductions of these statuettes were largely on sale, were they not?

A. They were.

R. D. Q. 36. Speaking as an artist, what difference, if any, do you see between those reproductions and the reproductions of
38 a given design for box-paper, wall-paper etc., in respect of all being articles of manufacture?

Question objected to as incompetent, for the reason that the question of law suggested by the question is one for the court to pass upon. The question is also objected to as immaterial to any issue in the case.

A. I can see no difference.

R. D. Q. 37. What is your opinion in respect of these two suggested illustrative cases "The Gibson Girl" series and the Rogers statuettes, as to whether they are respectively works of art and whether they possess artistic merit?

A. They both undoubtedly possess artistic merit; both "The Gibson Girl" series and the Rogers statuettes being done by men universally accepted and recognized as artists. They are undoubtedly works of art.

Deposition closed.

Signature waived.

Attest:

FANNIE FISK,

Special Examiner.

39 MILTON R. WOOD, a witness called on behalf of the complainant, having been duly sworn, in answer to the interrogatories propounded to him by complainant's counsel testified as follows:

Q. 1. What is your name, age, residence and occupation?

A. My name is Milton R. Wood, I am 33 years old, live at 118 East 17th Street, New York City, and am a lithographer.

Q. 2. State whether or not you are the proprietor of your business?

A. I am.

Q. 3. How long have you been in business for yourself?

A. Five years the 21st of next March.

Q. 4. Please state, in a general way, what kind of lithographing work you do chiefly?

A. Color lithography, from small picture cards to large fancy posters.

Q. 5. Have you in your business occasion to employ artists and

designers to make designs and sketches for lithographic reproduction by you?

A. Yes.

Q. 6. When you so employ an artist or designer and the design or sketch is completed and turned over to you, please state what is the custom of your trade in respect of what rights in and to the design or sketch are transferred to you when you pay for the same?

Mr. BUSSER: With consent of complainant's counsel, right to object to this question and all questions along similar line reserved.

A. The sketch belongs entirely to me with all rights of reproduction. We have the full right to copyright any design that we buy. Most of our customers insist upon this. One of our customers has a contract with us which protects him against any lawsuit that might arise on account of any design which we have sold him reproductions of. He also has a contract with us in which we are bound to protect him against any lawsuits arising from the
40 trespassing of the private rights of any individual model or other person whose face or portrait may have been used without their permission or without our being able to show a receipt that they were paid as a model for their portrait.

Q. 7. Outside of this particular customer to whom you referred, about how often, if at all, do you take any assignment in writing from the artist or designer when he delivers his work to you and you pay him for it?

A. We always consider the receipted bill to be sufficient for that purpose. We don't take any assignment.

Q. 8. And you say this is the general trade custom among lithographers?

A. I have been selling lithography in New York City for fifteen years, including the five years I have been in business for myself, and I've worked for five different large houses; I've never known any houses of these five any more careful than ours, and the custom regarding this matter is about the same. I've never known them to do anything different.

Direct-examination closed.

Cross-examination by Mr. BUSSER, without waiving objections:

X Q. 9. Will you give me one example in your own business of a purchase by you from a designer or artist of a design or picture, giving the name of the artist or designer, the subject of the design or picture, the consideration paid, and the approximate date of the transaction, which design or picture you applied for and obtained copyright protection?

A. The name of the artist is G. F. Muendel; the subject is three box-covers "Ribbon and Seal" design, and they were for
41 the Harris Suspender Company; the price for the three was, approximately, $75.00; the date when they were paid for was August 15, 1908; the papers for the copyright we received

back September 5, 1908; the copyright was taken out by me at the request of the customer.

X Q. 10. What agreement did you have with Mr. Muendel in regard to this transaction?

A. No special agreement, excepting that he made the designs and we paid for them. He knew we intended to have them copyrighted.

X Q. 11. How do you know that he knew that you intended to have them copyrighted?

A. To my best recollection I told him about this matter, because I was fearful that a certain man to whom I had submitted these designs might appropriate them for his own use without paying me for them or giving me an order to reproduce them by lithography.

X Q. 12. When was this understanding had with Mr. Muendel as to your intention to copyright the designs?

A. There was no understanding; I simply told him the circumstances of the case and mentioned that I intended to copyright them for fear the Harris Suspender Company might not be protected, as they wished to use them during the Christmas season of 1909, and if any one used them before it might be very harmful to them and cause me a lot of trouble.

X Q. 13. When did you mention to Mr. Muendel your intention to copyright the designs?

A. It must have been three or four weeks after they were handed to me and paid for.

Deposition closed.
Signature waived.

Attest:

FANNIE FISK,
Special Examiner.

42 GEORGE F. MUENDEL, a witness called and duly sworn on behalf of the complainant, in response to interrogatories propounded to him testified as follows:

Q. 1. What is your name, age, residence and profession?

A. My name is George F. Muendel; I am 37 years old, live in Wyoming, N. J., and am an artist.

Q. 2. Where were you born, Mr. Muendel?

A. At West Hoboken, N. J.

Q. 3. So you are a citizen of the United States?

A. I am.

Q. 4. Where did you reside on the 23rd of September, 1905, and for some time prior to that date?

A. Wyoming, N. J.

Q. 5. Please look at the framed picture now present, which has been marked in this case "Complainant's Exhibit Copyrighted Painting," and state if you know who made it?

A. I made that.

Q. 6. Please state how you came to make it?

A. I was commissioned by the Brett Lithographing Company to do it.

Q. 7. Did you or not know at the time you received this commission or at or about the time the picture was finished for whom it was intended?

A. Yes, I knew it was for the Dejonge Company.

Q. 8. You mean Louis Dejonge & Company, the complainant in this suit?

A. I do.

Q. 9. After the picture was completed by you what did you do with it?

A. I delivered it to the Brett Lithographing Company.

Q. 10. To what person connected with that company, if you remember, did you so deliver it?

A. To Mr. Frazier.

Q. 11. Do you know whether Mr. Frazier was an officer of the company; and if so, what officer?

43 A. I am not certain about that; I think he was secretary or treasurer, or both; as far as I am concerned, he was always in supreme control over there.

Q. 12. When you turned this picture over to him did he pay you for it?

A. Yes.

Q. 13. And when you so turned it over did you sign anything in writing respecting the sale or transfer of it?

A. Well, I merely receipted an ordinary bill of sale.

Q. 14. Do you mean an ordinary mercantile bill or a legal bill?

A. Well, what is the difference between a mercantile and a legal bill of sale?

Q. 15. The ordinary mercantile bill is the sort of bill a person receives when he sells an article, receives his pay for it, and the usual bill is made out and receipted by him; a legal bill of sale is a formal paper, usually on a printed blank, by which certain personal property mentioned in the body of the bill of sale or in a schedule annexed to it is, by formal legal phraseology, assigned and transferred to a party named in the bill?

A. It was an ordinary mercantile bill of sale, and, as I remember, the article was itemized.

Q. 16. Did you receipt the bill?

A. Yes, sir.

Q. 17. Now when you turned this picture over to Mr. Frazier and receipted your bill for it, what property rights in the picture or design did you understand and consider you transferred to the Brett Lithographing Company?

Objected to as incompetent, irrelevant and immaterial. What passed either depends upon the law governing a transaction of the kind detailed by the witness or upon the express terms of the contract of sale between the parties.

A. Why, I considered that I turned over all rights.

Q. 18. State whether you mean by your last answer all rights of reproduction and copyright?

44 Same objection, and also as leading.

A. I do mean that.

Q. 19. State whether or not since this transaction occurred you have ever made or now make any claim to a right to copyright the said picture?

Same objection.

A. I do not.

Q. 20. Please state whether or not prior to your making this design the design was ever published in this country or in any foreign country so far as you know?

A. I know that it wasn't.

Q. 21. Please look at the catalogues now shown you and state whether or not you are the Mr. George F. Muendel referred to at page 49 of one of them and page 23 of the other one?

Witness is handed catalogues of The Society of American Artists and the National Academy of Design put in as exhibits.

A. I am that party.

Q. 22. Please state by whom the pictures referred to at these respective pages of these catalogues under your name were painted?

A. I painted them; they are my own works.

Direct examination closed.

Cross-examination by Mr. BUSSER, without waiving objections:

X Q. 23. How did you know on or before the date that you finished the design marked "Complainant's Exhibit Copyrighted Painting" that it was intended for Louis Dejonge & Company?

A. Why, because Mr. Bensch of the firm of Louis Dejonge
45 & Company was in the habit of calling at the office of the Brett Lithographing Company and criticizing and going over those flower sketches with me.

X Q. 24. When you were commissioned by the Brett Lithographing Company to make this design for what purpose did they say they wanted it?

A. Well, those things are always referred to as fancy paper designs in the lithographic trade.

X Q. 25. What are these fancy papers used for?

A. As coverings for boxes mostly; I can't state positively what other uses they are for, except that they may be used for the insides of books.

X Q. 26. What requirements were specified by the Brett Lithographing Company when you received this commission that caused you to select spruce, holly and mistletoe as the subject-matter of the design?

A. They said they wanted something that would be suitable for the Christmas holidays.

X Q. 27. Why did you in making this design so draw it that the top and bottom edges as well as the two side-edges matched or merged into each other?

A. Because the order called for a fancy paper sketch, and by

that is meant a sketch that can be carried along indefinitely by simply reproducing the same thing and placing them side by side.

X Q. 28. Have you ever applied for copyrights on any work of art produced by you?

A. No, sir, because it is understood in the lithographing business that unless stated to the contrary the purchaser of the sketch receives all rights.

Cross-examination closed.

Redirect examination:

R. D. Q. 29. Please state whether anything was stated to the contrary when you transferred this design in question here to
46 the Brett Lithographing Company?

A. No, there was nothing stated to the contrary.

Deposition closed.

Signature waived.

Attest:

FANNIE FISK,
Special Examiner.

Adjourned to meet pursuant to agreement.

NEW YORK, *Oct.* 16, 1908.

The counsel for the respective parties hereto having mutually agreed to resume the taking of complainant's prima facie proofs for final hearing this Friday, October 16, 1908, at eleven o'clock in the forenoon, the testimony for complainant duly proceeded at the before mentioned office of its counsel at the said time.

Present: Counsel as before.

CHARLES W. FRAZIER, a witness called and sworn on behalf of the said complainant, testified as follows:

Q. 1. What is your name, age, residence and business?

A. My name is Charles W. Frazier; I am 34 years old; I live at 174 Prospect Place, Brooklyn, and am Secretary of the Brett Lithographing Company.

Q. 2. Where is the Brett Lithographing Company carrying on its business?

A. 605 West 129th Street, New York.

Q. 3. So far as you have knowledge how long has that company carried on its lithographing business in the city of New York?

A. The present corporation which has owned it has car-
47 ried it on for about twelve to fifteen years; the old company goes back to 1841.

Q. 4. How long have you been secretary of the present corporation?

A. Seven years.

Q. 5. Are you acquainted with Mr. George F. Muendel, an artist?

A. I am.

Q. 6. Did you know him prior to the month of May, 1905?

A. Yes.

Q. 7. Did you in that month give him a commission to make a sketch of any subject; and if you did, state if there is anything here present showing the sketch which he made upon such commission; and also please state about when the sketch was delivered to you by him?

A. During the latter part of the month of ——, 1905, at the request of Mr. Bensch representing Louis Dejonge & Company, I commissioned Mr. George F. Muendel to make a water-color painting of holly and mistletoe. This painting was finished and delivered by Mr. Muendel to me on May 5, 1905, and was shortly thereafter given by me to Mr. Bensch. The picture I see here I recognize to be the painting made by Mr. Muendel.

Witness refers to the framed picture marked "Complainant's Exhibit Copyrighted Painting."

Q. 8. Do you know whether Mr. Muendel was paid for this painting; and if so, will you please state who paid him, and on what date he was paid?

A. The Brett Lithographing Company paid Mr. Muendel on the date when he delivered the painting to me, May 5, 1905.

Q. 9. How are you able to fix this date?

A. I examined the bookkeeping records of the Brett Lithographing Company.

Q. 10. Did you examine these records before you came here to testify?

A. Yes.

48 Q. 11. And do they give the date of this payment as May 5, 1905?

Question objected to as calling for secondary evidence.

A. Yes.

Q. 12. Were those records the records which were at that time kept in the ordinary course of the Brett Company's business?

A. Yes.

Q. 13. Is it within your knowledge whether entries of the character that I am inquiring about were made in those records at that time according to the truth as it actually was of the matters entered in them?

A. Yes.

Q. 14. Who made the entries in those records at that time?

A. Bookkeeper.

Q. 15. Have you knowledge as to how near to the time when the transactions entered in those records occurred the entries were made?

A. Yes, I have knowledge. I signed the check which paid Mr. Muendel, and the check book and the cash book show that the payment was made on that date.

Q. 16. When you gave this check to Mr. Muendel for this painting at this time did you fill out a stub for the check?

This question is objected to as calling for secondary evidence.

Objection is taken to this whole line of examination for the same reason.

A. No; the bookkeeper filled out the stub.

Q. 17. Is that stub still preserved?

A. Yes.

Q. 18. Is there any objection to the check book with that stub in it and the cash book you referred to being produced here so that defendant's counsel may inspect the stub and the entry in the cash book?

A. None whatever.

49 Q. 19. Now, please state once more for whom you acted in giving the commission for this painting to Mr. Muendel, and also for whom you acted in making the payment for it to him?

A. Louis Dejonge & Company, of New York City.

Q. 20. Please state whether or not the Brett Lithographing Company was reimbursed by anybody for this payment; and if so, who reimbursed it, and about when was the reimbursement made?

A. It was, by Louis Dejonge & Company, *on* or about October, 1905.

Q. 21. Why was there that interval between May and October before that reimbursement was made?

A. Because in the meantime the Brett Lithographing Company reproduced the painting as a fancy box paper under an order to do so from Louis Dejonge & Company, and included the sum paid for the painting in the bill for the lithographing work done.

Q. 22. State what was the fact during all that year as to whether the Brett Company was having frequent business dealings with Louis Dejonge & Company?

A. The Brett Company was during that year having frequent dealings with Louis Dejonge & Company.

Q. 23. Did any reason exist during that year between May and October why, if the Brett Company had wished to be reimbursed for the amount it paid to Mr. Muendel for the painting any earlier than October, it could not have obtained such reimbursement from Louis Dejonge & Company?

A. No reason whatever. If it had not been that we had received an order to reproduce the design, we would have sought reimbursement for the painting at once; but we felt that it might be convenient for Dejonge & Company to have all the items of expense incidental to this job of fancy paper included in one charge.

Q. 24. Have you knowledge of what is the custom in the lithographing trade when a commission is given to an artist for

50 a design or picture to be reproduced by lithographing and the picture is completed and delivered and paid for, as respects what rights of the artist in the design or picture pass to the purchaser; and if you have such knowledge, please state what rights pass according to such custom.

Question objected to as irrelevant and immaterial, inasmuch as the transfer of title to a copyright is not dependent upon any trade custom, but can only be effected by express agreement of the parties.

A. Yes, I have knowledge of the custom. The custom is that all rights, including the right to copyright, pass from the artist to the purchaser when a painting is bought for lithographic reproduction.

Q. 25. In this particular transaction with Mr. Muendel what was your understanding of what rights passed from Mr. Muendel through the Brett Company to Louis Dejonge & Company?

Objected to as incompetent, and also as irrelevant for the reason given for the objection to the last preceding question.

A. It was specifically understood by Mr. Muendel and by Louis Dejonge & Company that this painting was to be copyrighted by Louis Dejonge & Company for whom it was made, and that the rights to copyright it passed to Louis Dejonge & Company.

Q. 26. Will you please compare the picture already shown you marked "Complainant's Exhibit Copyrighted Painting" with the lithographed sheet heretofore put in evidence marked "Exhibit Defendant's Product," and state whether or not in your opinion the lithographed reproductions on that sheet embody and contain the design and picture shown in the painting?

51 Question objected to as incompetent for substantially the reasons heretofore cited in the objection to Q. 11 of the testimony of the witness Du Mond.

A. In my opinion they do.

Direct examination closed.

Cross-examination by Mr. BUSSER, without waiving objections:

X Q. 27. In your answer to Q. 7 you made reference to a Mr. Bensch. Do you refer to Mr. Hermann Paul Bensch?

A. My recollection is that the Bensch referred to was the only one of that name employed at that time by Louis Dejonge & Company. He is now dead. I do not remember his first name or his initials.

X Q. 28. Do you know Mr. Charles F. Zentgraf who is or was the president of Louis Dejonge & Company?

A. I did know him, if you refer to the former president who died about eight months ago.

X Q. 29. In what business is Louis Dejonge & Company engaged?

A. Generally in the manufacture and sale of paper.

X Q. 30. Do they do their own lithographing work?

A. No.

X Q. 31. You state that the Brett Company had frequent business dealings with Louis Dejonge & Company. What was the nature of the dealings they had together?

A. We bought paper from them, attended to the details of having designs made for them, reproduced these designs by lithography and printed editions of fancy box papers.

X Q. 32. The late Mr. Bensch has given an affidavit in this case that "Complainant's Exhibit Copyrighted Painting" was purchased from the artist who painted it for the purpose, among other

52 things, of employing it as a design for fancy and ornamental papers for boxes and other articles to be sold at Christmas and

New Years, and the late Mr. Zentgraf has given an affidavit in this case in which he states "that the painting which was copyrighted by the complainant on the 23rd of September, 1905, as set forth in the bill of complaint, was produced especially to provide an artistic and attractive paper to be used in the manufacture of boxes and other articles intended to be sold at Christmas and New Years." Do the statements made by these gentlemen coincide with your own recollection or understanding?

A. They do.

X Q. 33. How soon after the exhibit "Copyrighted Painting" was delivered to you, which I understand you say was on or about May 5, 1905, was it that you reproduced the same by lithography?

A. We proceeded at once to reproduce the painting by lithography, as near as I can recollect. The finished result was delivered to Louis Dejonge & Company in October, 1905.

X Q. 34. Am I to understand that you were engaged on this work about five months?

A. No, we weren't engaged during all of that time on this work. Our dealings with Louis Dejonge & Company involved the reproduction of several designs in addition to the one referred to in this suit, and our practice was to reproduce these paintings or designs by drawing them on a stone and furnishing Louis Dejonge & Company with proofs. From these proofs, as I understand it, their salesmen sold, and our orders to print editions of the several designs depended largely on what they sold. In consequence the order to print and the delivery of the printed sheets was several months sometimes after the proofs were made.

X Q. 35. Then I understand that the only matter respecting the exhibit "Copyrighted Painting" that you delivered to Louis
53 Dejonge & Company prior to October, 1905, were what you called proofs for their salesmen to sell by?

A. At the time the proofs were delivered the sketch was also delivered; otherwise they could not tell if the reproduction was a faithful one.

X Q. 36. About when, as nearly as you can recollect, was it that you delivered to Louis Dejonge & Company the sketch (by which I assume you mean the exhibit "Copyrighted Painting") and the proofs?

A. My recollection is that it was some time in the months of July or August, 1905.

X Q. 37. How did these proofs to which you refer differ in character from the sheets containing repeats of the design which you afterward, in October, 1905, delivered to Louis Dejonge & Company?

A. Substantially they did not differ at all.

X Q. 38. Were these proofs marked "Copyrighted" by the Brett Company?

A. I have no recollection in regard to the matter.

X Q. 39. Do you know whether the sheets delivered in October, 1905, were marked "Copyrighted"?

A. They were by the Brett Company marked "Copyrighted 1905 by Louis Dejonge & Co."

X Q. 40. When the original sketch was turned over by the Brett Company to Louis Dejonge & Company was it framed as it now is?

A. No.

X Q. 41. Is it your custom when you purchase designs for the purpose of reproducing them by lithography to frame the same?

A. No, we never frame them; if they have frames on we take them off.

X Q. 42. What disposition do you usually make of the original sketches? I refer to the sketches which are made by designers on special commission?

Objected to as irrelevant and as not in proper cross-examination.

54 A. We invariably hand the painting over to our customer if, as in this case, he is responsible for the payment for the same; the design is his property and I feel that we are obligated to give it to him. Sometimes we buy sketches for ourselves or have them made for us, in which cases they remain our property until we sell them.

X Q. 43. Do you always sell sketches that you commission designers to make for you, assuming that you are not acting in the purchase of a design for a customer?

A. No, not always, although we try to.

X Q. 44. I refer to the original sketches after you have reproduced them and sold the reproductions; about what proportion of these do you sell?

Same objection as before.

A. We invariably sell the original sketch, if we are able to do so, except when we do not wish to give the exclusive right of reproduction to one customer, expecting to sell duplicates to other customers—in which cases we retain the ownership and all rights in the original painting. In my own business such instances are rare. Other lithographers, who publish more extensively than we do, retain the ownership in the majority of the originals that they buy.

X Q. 45. Do I understand that when you succeed in disposing of an original sketch for a design that you have bought and paid for, that you at the same time dispose of the right to reproduce?

A. When we buy a painting we endeavor to sell it to some one who wishes to use it for a calendar or in some other appropriate way, in which case we charge up the cost of the painting as an incident to the cost of lithographing the edition of calendars sold, and the sketch or painting becomes the property and is given to the customer who has ordered the calendars. Other lithographers,

55 who manufacture and sell what is commonly called "stock designs," purchase, copyright in their own names, and at all times retain the ownership of the original, selling only copies in such quantities as they are able to dispose of.

Cross-examination closed.

Redirect examination:

R. D. Q. 46. How many proofs of the exhibit "Copyrighted Painting" did you deliver as you have stated to Louis Dejonge & Company?

A. I do not know, but to the best of my recollection about half a dozen.

R. D. Q. 47. Have you knowledge as to whether any of that half dozen were sold at any time?

A. I think I have, from the fact that due to cross marks at the top and sides of all proofs—necessarily there as an incident to their being made—they are unsalable. If this be knowledge, I know that none were sold.

R. D. Q. 48. Mr. Frazier, are you the practical manager of the Brett Company's business and have you been for some years?

A. I am, and have been for some years officially and actually the general manager as well as the secretary of the Brett Lithographing Company.

Deposition closed.
Signature waived.

Attest:
FANNIE FISK,
Special Examiner.

56 HENRY P. BAILEY, a witness called and sworn on behalf of the said complainant, testified as follows:

Q. 1. What is your name, age, residence and business?

A. My name is Henry P. Bailey; I am 63 years old, live at East Orange, N. J., and am a lithographer.

Q. 2. Are you an employing lithographer?

A. Yes.

Q. 3. Under what name or style is your business carried on?

A. Trautmann, Bailey & Blampey.

Q. 4. Where is your business office and lithographing establishment located?

A. Business office is 312 Broadway; the works are at the corner of Greenwich and Vandam Streets, New York City.

— 5. Are you the Mr. Bailey whose name appears in the name you have given us under which your business is carried on, and is the concern a corporation?

A. Yes.

Q. 6. How long has that corporation been in business?

A. Since 1900.

Q. 7. What is your connection, whether official or otherwise, with the corporation?

A. I am treasurer and general manager.

Q. 8. How long have you been treasurer and general manager?

A. Been general manager ever since the beginning of the business; been treasurer a little over three years.

Q. 9. Before this corporation was organized were you in the lithographing business as an employer; and if so, for about how long?

A. Yes, I was in the business before the corporation was organized. Previous to the corporation the business was carried on by a firm having the same name as the company; that firm commenced business in February '84, and I have been general manager of the business ever since that time.

Q. 10. Were you in the lithographing business as an employer previous to 1884?

A. Yes.

57 Q. 11. For about how long?

A. For about two years. Previous to that two years I was with the Forbes Lithographing Manufacturing Company for eleven years, and for five or six years of that time I was general superintendent of that company.

Q. 12. Now, have you knowledge of what has been during all this period and now is, the custom in the lithographing trade when a commission is given to an artist for a design or picture which is to be reproduced and the design or picture is completed and paid for, as respects the rights in the picture which pass from the artist to the purchaser; if so, please state what such custom is?

Objected to as irrelevant and immaterial, the transfer of title to a copyright not being dependent upon any trade custom but capable of being effected only by express agreement or assignment.

A. I know what the custom has been and is. The custom is that when the lithographer purchases the sketch or design from the artist all rights of the artist pass to the buyer.

Q. 13. How about the right of the purchaser to copyright the design or picture?

Same objection.

A. The right to copyright passes also.

Q. 14. State whether or not it is customary in such transactions to execute any formal bill of sale or assignment?

Same objection.

A. I never have done so, and never have heard of its being done.

Q. 15. Will you please look at the picture which is now shown you and which is marked "Complainant's Exhibit Copy-
58 righted Painting," and compare it with the lithographed sheet also shown you marked "Exhibit Defendant's Product," and state whether or not, in your opinion the lithographed sheet contains and embodies the design and picture represented in the exhibit "Copyrighted Painting?"

Objected to as incompetent, as the witness has qualified virtually as an expert and as such his evidence as to the identity of the alleged copyrighted painting and the alleged infringing design is not admissible. The question is also objected to as irrelevant and immaterial in view of the testimony of witnesses who have heretofore testified to the effect that the alleged copyrighted painting is in fact a design

for an article of manufacture and a design intended primarily for reproduction by lithography and intended for sale in such reproduced shape and as an article of manufacture; wherefore the identity or non-identity inquired about is of no materiality.

A. I think it does contain and embody the design of the copyrighted painting.

Q. 16. How frequently are you called upon in your business to compare original sketches with lithographed reproductions of the same to determine whether such reproductions are faithful ones or not?

A. Continuously.

Direct-examination closed.
No cross-examination.
Signature waived.

Attest:
FANNIE FISK,
Special Examiner.

59 CHARLES PETRE, JR., a witness called and sworn on behalf of the said complainant, testified as follows:

Q. 1. What is your name, age, residence and business?

A. My name is Charles Petre, Jr.; I am 32 years old, live in Weehawken, N. J., and am a practical lithographer.

Q. 2. How long have you been in that business; under what name or style is your business carried on; is it a firm or corporation, and where is your business office and lithographing establishment located?

A. I have been in the business in all about seventeen years, first as stipple artist, and I have been vice president in the business with which I am now connected for three years; the business is a corporation under the name of Petre, Schmidt & Bergmann, and its office and works are located in the city of New York.

Q. 3. Are you familiar with the custom in the lithographing trade when a commission is given to an artist for a sketch or picture to be reproduced by lithography and the sketch is delivered by the artist and paid for, respecting what rights in the design or picture pass from the artist to the purchaser; if so, please state what rights according to that custom so pass?

Same objection as to Q. 12 of the testimony of Henry P. Bailey.

A. I have such knowledge. It is usually the custom after the sketch or design is delivered to you from the artist that we, the lithographers, then own all rights in that design and have privilege of reproducing it as we see fit.

Q. 4. To what extent, if at all, is it customary in such transactions to take any formal written assignment or transfer or agreement from the artist in respect of any of these rights?

Same objection.

60 A. We simply get a receipted bill for it; the artist gives us all rights.

Q. 5. How frequently, if at all, are you called upon in your business to compare lithographed reproductions of original sketches or pictures with such originals to determine whether or not the reproductions are faithful and correct?

A. It is almost a daily occurrence for us to compare finished labels or finished products with the original sketches.

Q. 6. How frequently have you yourself made such comparisons?

A. Whenever the labels are finished, two or three times a week.

Q. 7. How frequently have you yourself been called upon to compare with the original design other kinds of lithographed reproductions than those of labels?

A. Very seldom called upon.

Q. 8. From such experience as you have had in making comparisons between original designs and lithographed reproductions thereof, please state whether or not in your opinion the lithographed sheet now shown you marked "Exhibit Defendant's Product" represents and embodies the design and picture shown in the framed picture also shown you marked "Complainant's Exhibit Copyrighted Painting?"

Same objection as to Q. 15 of Bailey testimony.

A. It is not the same as this.

Q. 9. What differences do you find between the lithographed sheet and the framed picture?

A. The sheet has some cones on where the original drawing hasn't got the cones, and although the groupings look very much alike, the berries do not count the same; there are different scatterings of the berries.

Q. 10. Do you see any other differences?

61 A. The fir, that is what I guess it is, f-i-r, seems to be a little heavier in the original painting than in the lithographed sheet, although the sheet contains more.

Q. 11. Any other differences?

A. That is about all I can see.

Direct-examination closed.

No cross-examination.

Signature waived.

Attest:

FANNIE FISK,

Special Examiner.

CHRISTOPHER F. RAICHLEN, a witness called and sworn on behalf of the said complainant, testified as follows:

Q. 1. What is your name, age, residence and business?

A. My name is Christopher F. Raichlen; I am 35 years old, live at 33 East 45th Street, Bayonne, N. J., and am president of the Modern Paper Box Company, incorporated.

Q. 2. How long has that company been in the box-making business?

A. A little over two years.

Q. 3. Had you been a practical boxmaker prior to that time; if so, about how long?

A. Yes, I had been; for about twenty years.

Q. 4. Are you personally familiar with the manipulations of making paper boxes and with various styles of fancy papers for the coverings of the same?

A. Yes.

Q. 5. I show you a lithographed sheet which has upon it the lithographed words "Copyright 1905, by Louis Dejonge & Co." and which also has the various repeats of the design shown on it ruled off in blue ink so that they may be distinguished one from
62 the other, and I ask you as a practical boxmaker of what use or value such a sheet would be for covering paper boxes if the copyright notice just referred to was repeated on every repeat of the design on the sheet at, for instance, the places where the parallel brown marks appear in one corner of each repeat?

A. Of no commercial value.

Q. 6. Suppose you were called upon to cover boxes small enough for one of the repeats to be used what would you do with the copyright notice if it were placed on that repeat at, say, the point where the parallel brown marks are on the repeats on this sheet?

A. Cut it off.

Q. 7. If you were buying sheets of this character with one single copyright notice in the upper right-hand corner where the actual notice is on this sheet, would or not that copyright notice be practically a notice to you that the design shown in repeats on the sheet was a copyrighted one; of course in putting this question you are to consider the blue lines and the brown marks as not existing?

Question objected to as irrelevant and immaterial for the reason that what is or is not a compliance with the law with respect to copyright markings is a question of law not dependent upon the opinion of one unversed in law; and, further, the question is objected to as incompetent, in that if the question of a sufficient and legal marking depended upon whether the marking in question would give due notice of the copyright to a purchaser, that fact would have to be provided by the testimony of the ultimate purchaser at retail, or by the purchaser of boxes lined or covered with the paper in question.

63 A. It would.

Q. 8. Suppose you were using for a box-cover the whole of this sheet which has been shown you with the copyright notice "Copyright 1905 by Louis Dejonge & Co." in the corner as it is on this sheet, but of course the blue lines and the brown lines not existing on the sheet, what would you do in the practical covering of such a box with those words "Copyright 1905 by Louis Dejonge & Co.?"

A. We invariably remove copyright marks.

Direct-examination closed.
No cross-examination.
Complainant's counsel puts the sheet shown this witness in evidence and it is marked "Complainant's Exhibit Ruled Off Repeats."
Signature waived.

Attest:
FANNIE FISK,
Special Examiner.

CHARLES B. BALDWIN, a witness called and sworn on behalf of the said complainant, testified as follows:

Q. 1. What is your name, age, residence and business?

A. My name is Charles B. Baldwin; I am 44 years old, live in New York, and am a paper-box manufacturer.

Q. 2. How long have you been a paper-box manufacturer?

A. About twenty years.

Q. 3. Where have you carried on your business during that time?

A. New York City.

64 Q. 4. Please mention, in a general way, some of the various styles of paper boxes, especially ornamental ones, that you have covered during this period?

A. Stationery, candy, holiday boxes.

Q. 5. How much of this time have you been an employing box-maker?

A. All the time.

Q. 6. Will you please look at the lithographed sheet now shown you marked "Complainant's Exhibit Ruled Off Repeats" in which the various repeats shown on the sheet are ruled off in blue ink, and assume that the copyright notice "Copyright 1905 by Louis Dejonge & Co." which appears in the right-hand upper corner of the sheet were repeated on every repeat on the sheet, at, for example, the place where the parallel brown lines appear, of what practical value would the sheet be for covering fancy boxes?

A. It would be of little or no value.

Q. 7. Suppose you were called upon to cover a box small enough for a single one of these repeats to be used, what would you do with the copyright notice if it were on such repeat where the parallel brown lines are?

A. I would cut it off before applying the paper to the box.

Q. 8. Suppose you were covering a box large enough to require the whole of a sheet the size of this one and suppose the sheet had upon it the copyright notice "Copyright 1905" etc. which is now upon it, what would you do with that copyright notice?

A. I would cut the copyright notice from the sheet before applying it to the box.

Q. 9. If you were buying sheets like this one shown you having upon it the notice "Copyright 1905 by Louis Dejonge & Co." but of course with the blue lines and the brown lines not present, would you or not understand from the notice that the design shown on the sheet was a copyrighted one?

65 Same objection as to Q. 7 of the testimony of Mr. Raichlen.

A. I should understand that the sheet with the design on the sheet was copyrighted.

Direct-examination closed.
No cross-examination.
Signature waived.

Attest:
FANNIE FISK,
Special Examiner.

Adjourned to meet again by mutual agreement.

NEW YORK, *Oct.* 23, 1908.

Complainant's prima facie proofs for final hearing resumed by mutual consent at the same place as heretofore this Friday, October 23, 1908, at twelve o'clock noon.

Present: Counsel as before.

REUBEN NIXON HOWELL, a witness called and sworn on behalf of the complainant, testified as follows:

Q. 1. What is your name, age, residence and business?

A. My name is Reuben Nixon Howell; I am 36 years old, live in Hackensack, N. J., and am a paper-box manufacturer.

Q. 2. Are you the president of any paper-box manufacturing concern; if so, what one?

A. Yes, the Jos. Walter Box Co.

66 Q. 3. Where does that company carry on its business?

A. 49 Murray Street, City of New York.

Q. 4. How long have you been engaged in the box-making business?

A. About seven years.

Q. 5. During that time has it been a part of your business or work to make fancy boxes, that is, boxes covered with fancy box-paper?

A. We always make a certain amount of the fancy boxes at this time of the year.

Q. 6. Has that been the custom in your business during all the time you have been a paper-box manufacturer?

A. Yes.

Q. 7. Will you please look at the lithographed sheet now shown you marked "Complainant's Exhibit Ruled Off Repeats," and state of what value a box-paper sheet having such a copyright notice as appears in the upper right-hand corner of this sheet printed on each repeat of the design at, for instance, the place on each repeat indicated by the brown lines in the corner of each of such repeats, would have for covering boxes?

A. It would be absolutely worthless to me.

Q. 8. Will you please look at the various lithographed sheets of fancy paper now shown you and state whether or not you are familiar with the same or any of them as being fancy papers on the market?

Question objected to as immaterial to any of the issues in the case.

A. All of them are sheets I have seen on the market; some of them I have used. I have samples of them all in my place.

Q. 9. Have you observed in respect of these sheets or any of them at any time or times when you have seen them whether they had on them any copyright notice; and if so, where upon them was such copyright notice placed?

67 Objected to as immaterial; also as calling for secondary evidence.

A. Yes; always in the margin.

Q. 10. On the white paper in the margin or on the design near to the margin?

Same objection.

A. I have seen the copyright mark both ways—on the white margin, and on the design but always near the margin.

Q. 11. In the manner in which it is printed on these sheets here present?

A. Yes, that is the regular custom.

The seven sheets shown the witness are offered in evidence by the complainant, to be attached together and marked "Complainant's Exhibit Sundry Sheets."

The offer in evidence of the sheets of boxpaper referred to by the witness is objected to for the following reasons:

First, as immaterial to any issue in this case. This objection cannot be made any more specific in the absence of any information with respect to the purpose of their introduction into the case.

Second, as incompetent for the reason that no alleged custom of the trade can justify non-compliance with the mandatory provision of the copyright statutes.

Third, as irrelevant under any view, in the absence of any information proof with respect to the nature of the alleged copyrights.

Q. 12. In covering a box with a paper having a design upon it upon which a notice of copyright is placed, what is done with
68 the copyright notice or the part of the sheet which contains the copyright notice?

A. The copyright will either be trimmed off or turned under so it wouldn't show.

No cross-examination.

Signature waived.

Attest:

FANNIE FISK,
Special Examiner.

BERNARD MEYER, a witness called and sworn on behalf of the complainant, testified as follows:

Q. 1. What is your name, age, residence and business?

A. My name is Bernard Meyer; I am 52 years old, live at 109 East 76th Street, New York City, and am a paper-box manufacturer.

Q. 2. Where do you carry on your business?

A. 151 Chambers Street, New York City.

Q. 3. How long have you been in the box making business?

A. Since I was twelve years old.

Q. 4. About how many years of that time have you been in business yourself?

A. Since I was twenty-one years old—after my parents died.

Q. 5. Is it any part of your business to make what are called fancy boxes—boxes covered with fancy paper?

A. Altogether.

Q. 6. You mean, I suppose, that is your whole business?

A. Yes; my business is manufacturing fancy paper boxes only. We make nothing but high-class goods.

Q. 7. Please look at the lithographed sheet now shown you marked "Complainant's Exhibit Ruled Off Repeats," and
69 state of what value to you would be a sheet for covering fancy boxes having repeats of a design upon it like this sheet on each of which repeats was printed, say, at the place where the parellel brown lines appear in said repeats the copyright notice "Copyright 1905" etc. which appears in the upper righthand corner of the sheet?

A. I wouldn't buy it.

Q. 8. In using a box-paper sheet which has upon it a copyright notice what do you do with that part of the sheet which has the notice on it?

A. We leave it on there.

Q. 9. What becomes of it in covering the box?

A. Well, we cut up the paper and cover boxes. Once in a while a copyright letter will go into the box.

Q. 10. Just what do you mean by "a copyright letter?

A. What I mean by that is that we never destroy anything at all; we cover the box and turn in the paper. We never destroy the copyright.

Q. 11. Do you mean by that that the copyright notice would be seen on the inside of the box?

A. Not altogether; no, sir.

Q. 12. You say "not altogether;" will you please explain a little more fully what you mean by that expression?

A. I mean that sometimes it will appear on the inside of the box, and sometimes it will not.

Q. 13. When it does happen to appear on the inside of the box, do you mean that it will come at one place or another on the inside just as may happen?

A. We never pay any attention to it. It may appear any old place on the inside.

Q. 14. Please look at the lithographed sheets now shown you marked "Complainant's Exhibit Sundry Sheets" and state whether you have ever seen in the market or bought sheets of any of these designs?

A. I have bought that one (pointing to No. 607); and this one (pointing to No. 700).

70 Q. 15. What did you say about a Fourth of July novelty?

A. It was sold to me for a Fourth of July novelty; I am speaking of sheet No. 700. It was a Fourth of July novelty because it contained the emblems of the United States.

Q. 16. Did you observe the copyright notice on the sheets you bought like these two sheets?

Objected to as immaterial.

A. I did.

Direct-examination closed.

Cross-examination by Mr. BUSSER:

X Q. 17. What is the size of the smallest box that you cover with fancy paper?

A. One inch by one inch and a quarter.

X Q. 18. What is the size of the smallest box to which you would apply any of the paper comprised in the seven sheets before you?

A. We could use that on a box two inches by two inches by half an inch. I refer to sheet No. 607.

X Q. 19. How many boxes, approximately, of the size last mentioned would you cover with a sheet of the size of the sheet No. 607?

A. That will depend on the style of box; twelve boxes, more or less.

Cross-examination closed.

Redirect examination:

R. D. Q. 20. If you covered, say, twelve boxes with one of these sheets of this exhibit, even if the copyright notice on the sheet should happen to appear somewhere on the inside of one of the

71 boxes, of course there would be no copyright notice at all on any part of any of the other boxes?

A. That is correct.

Deposition closed.
Signature waived.

Attest:

FANNIE FISK,
Special Examiner.

HENRY B. JANES, a witness called and sworn on behalf of the complainant, testified as follows:

Q. 1. What is your name, age, residence and business?

A. My name is Henry B. Janes, I am 47 years old, live in Flat-

bush, Brooklyn, N. Y., and am vice-president and manager of H. S. Leclercq & Co.

Q. 2. Where is that company carrying on business?

A. 54 Duane Street, New York City.

Q. 3. What is its business?

A. Dealers in papers for boxmakers and bookbinders' supplies—fancy leathers and leathers used by bookbinders.

Q. 4. How long have you been connected with that business?

A. A little over two and a half years.

Q. 5. Does that company as a part of its business have designs for fancy papers procured by it lithographed and then does it sell the lithographed reproductions?

A. Yes.

Q. 6. Will you please look at the lithographed sheets now present marked "Complainant's Exhibit Sundry Sheets" and state whether any of those sheets have been on the market to your knowledge?

A. Three of them have been on the market; the others I have seen several times in small pieces. The three to which I refer are my own papers and I will mark them N507, N515 and N453.

72 Q. 7. Are these numbers your regular stock numbers for these papers?

A. They are.

Q. 8. Please look at the copyright notice on each of these three sheets to which you have referred and state when that notice was put on the sheets with reference to the time when they were manufactured?

A. They were put on at the time the goods were manufactured.

Q. 9. These sheets are intended chiefly for fancy boxcovers, are they not?

A. Yes.

Q. 10. Have you ever known any fancy boxpaper of this character to be used for covering a box large enough to require the whole sheet to cover it?

A. I have a slight recollection of one order where a whole sheet was used. This was a box that was made to hold ladies' fancy shirtwaists.

Q. 11. In the course of your business are you called upon to compare designs which your company obtains for fancy papers with lithographed proofs thereof for the purpose of determining how faithful the lithographed reproductions are to the original design?

A. All our designs are compared in this way.

Q. 12. Have you been in the habit of making such comparisons yourself?

A. I have.

Q. 13. In a general way, how frequently have you done that?

A. For the time that I have been with my present concern, and also previous to that, once a year for four or five years previous to my present position.

Q. 14. Will you please look at the framed exhibit now present

marked "Complainant's Exhibit Copyrighted Painting" and compare with it the lithographed sheet shown you now marked "Exhibit Defendant's Product," and state whether or not in your opinion the said lithographed sheet contains and embodies the design represented in the painting?

This question is objected to for the reasons given in the
73 objection taken to Q. 15 of the evidence of Henry P. Bailey.

A. I should say that it did.

No cross-examination.

Deposition closed.

Signature waived.

Attest:
FANNIE FISK,
Special Examiner.

Adjourned to a time to be agreed upon.

NEW YORK, *Oct.* 29, 1908.

Pursuant to the last adjournment herein the prima facie proofs for complainant proceeded today by mutual consent of counsel for the respective parties at 11 a. m.

Present: Counsel as before.

HENRY J. FACKINER, a witness called on behalf of the complainant, having been duly cautioned and sworn, testified as follows:

Q. 1. What is your name, age, residence and occupation?

A. My name is Henry J. Fackiner; I am 25 years old, live in Newark, N. J., and am a salesman.

Q. 2. For what concern are you a salesman?

A. Louis Dejonge & Company.

Q. 3. How long have you been a salesman for that company?

A. Since April 1, 1908.

Q. 4. What particular branch of the business are you sales-
74 man in?

A. Paper.

Q. 5. Does that include fancy papers such as are used for box coverings?

A. Yes.

Q. 6. Have you recently made any inquiries for the purpose of informing yourself whether certain designs of box-paper or fancy paper manufactured by others than Louis Dejonge & Company were on the market?

A. I did.

Q. 7. Will you please look at the sheet now shown you and state whether or not this is a sheet of such paper which you found to be now in use?

A. Yes, it is.

Sheet offered in evidence and marked "Complainant's Exhibit German Sheet No. 1."

The offer in evidence of the said sheet is objected to as incompetent, irrelevant and immaterial.

Q. 8. I now show you another sheet and will ask you if it is also a sheet which you found on the market and whether it is a German made sheet?

A. Yes, it is.

Sheet offered in evidence and marked "Complainant's Exhibit German Sheet No. 2."

Q. 9. Will you now please look at the lithographed sheet put in evidence in this case marked "Complainant's Exhibit Ruled Off Repeats," and state whether it is a part of your duty as salesman for Dejonge & Co. to have charge of their stock of lithographed sheets like this sheet and containing the design and picture upon this sheet?

A. Not at the present.

Q. 10. Have you heretofore been in charge of these sheets?

A. Yes, I have.

Q. 11. For about how long a time?

A. Three years previous to when I became a salesman.

Q. 12. Were you acquainted with the late Mr. Bensch who
75 was in the employ of Dejonge & Co.?

A. I was.

Q. 13. Did you have anything to do under him or in the department of the business which he had in charge?

A. I did.

Q. 14. Did those duties of yours in his department cause you to have anything to do with the sheets like this exhibit?

A. It did.

Q. 15. What did you have to do in relation to these sheets?

A. Put them in stock and lay them out for orders and for shipping.

Q. 16. Did you in these ways handle more or less of the copies of every edition of these sheets which was issued by Dejonge & Company down to the time you became salesman?

A. I did.

Q. 17. Now will you please state whether or not the copyright notice "Copyright 1905 by Louis Dejonge & Co." appeared on all the sheets of each of those editions?

A. It did.

Q. 18. I suppose that in all the sheets it was in about the same place in which it appears in this exhibit; is that correct?

A. Yes, it was.

Q. 19. Now will you please state whether or not any copies of any of the editions of the design or picture shown in this exhibit were put on the market or sold or published by Louis Dejonge & Company prior to the obtaining of the copyright by them?

Question objected to as incompetent, as it has not been shown that

the witness possesses any knowledge to qualify him to testify on the point inquired about.

A. They were not.

Q. 20. Are you able to state whether any of these copies were published by Dejonge & Co. prior to the month of September, 1905?

A. I cannot state.

Q. 21. So far as you know when were they first put on
76 the market or published by Dejonge & Co.?

A. Between the 25th of September, 1905, and the 1st of January, 1906. That is about—I don't know exactly when they were first put on the market.

Direct-examination closed.

Cross-examination by Mr. BUSSER, without waiving objections:

X Q. 22. By whom were you instructed to ascertain whether box-papers or fancy papers manufactured by others than Louis Dejonge & Company were on the market?

A. Mr. Van Duzer.

X Q. 23. Who is Mr. Van Duzer?

A. Manager of the Picture and Fancy Paper Department of Louis Dejonge & Company.

X Q. 24. Did he tell you why he wanted you to make these inquiries?

A. Yes, he did.

X Q. 25. Well, what did he say?

A. So he could produce them in evidence.

X Q. 26. Did he say why he wanted to produce them as evidence or what he wanted to show by them?

A. Where the place of the word "Copyright" should be.

X Q. 27. Has exhibit "German Sheet No. 22" any copyright mark upon it?

A. No, it has not.

X Q. 28. Why did you select that sheet then if, as you say, the purpose was to show by these sheets where the copyright mark was placed?

A. The words "Printed in Germany" to show where copyright by Louis Dejonge was put on end or side of sheet.

X Q. 29. Why did you select sheets of German make?

A. I had no reason.

X Q. 30. I understand you were instructed by Mr. Van Duzer to go out and buy any sheets of paper you could find on the market containing copyright marks on the end or side of the sheet
77 at about the location that the copyright mark was put on sheets sold by Louis Dejonge & Company. Is that correct?

A. It is, but we wished to show as Exhibit No. 2 the words "Printed in Germany" to show where "Copyright" would be placed.

X Q. 31. Where did you buy these sheet?

A. Each one at a different place, of customers of Louis Dejonge.

X Q. 32. Give me the names, please, of the customers of Louis Dejonge & Co. from whom you purchased each sheet?

A. Modern Paper Box Company and Bloom & Mandel.

X Q. 33. You purchased exhibit "German Sheet No. 1" from which of these two parties?

A. Modern Paper Box Company.

X Q. 34. By what means was the copyright notice or marking placed on the lithographed sheets containing the design appearing on the "Complainant's Exhibit Ruled Off Repeats" shown you?

A. I do not know.

X Q. 35. You say in answer to Q. 16 that you handled more or less of the copies of every edition of these sheets which was issued by Louis Dejonge & Co. down to the time you became salesman. Were you instructed to, and did you, examine each and every one of these sheets that you handled to see whether the copyright mark had been placed thereon?

A. No, I did not.

X Q. 36. Why have you testified that these sheets were first put on the market between September 25, 1905, and January 1, 1906; that is, why did you fix September 25 as the earliest of these two dates?

A. Because the goods were not put upon the market until they were copyrighted.

Mr. BUSSER: Answer objected to as irresponsive and incompetent.

X Q. 37. How do you know of your own knowledge that
78 these goods were not put on the market until they were copyrighted?

A. Because after sketches being approved, they were copyrighted or the design was copyrighted.

X Q. 38. Mr. Charles W. Frazier of the Brett Lithographing Company has testified that these sheets were printed by the Brett Lithographing Company for Louis Dejonge & Co.; that in the summer of 1905, about July or August, the Brett Lithographing Company furnished to Louis Dejonge & Company the original sketch together with proofs of the same for their salesmen to sell by, and that after the salesmen obtained orders from these proofs, the Brett Lithographing Company proceeded to print the sheets, or the first set of sheets, which were delivered to Louis Dejonge & Co. in October, 1905. Have you any information that would lead you to disagree with this testimony of Mr. Frazier?

A. I have not.

X Q. 39. In the summer of 1905 who were the salesmen who acted for Louis Dejonge & Co. in taking orders for fancy box-paper?

Objected to as irrelevant and immaterial, unless the question is confined to the orders for the paper containing the design or picture shown in "Complainant's Exhibit Copyrighted Painting."

Counsel for defendant states that he does not wish to so limit the present question.

A. I do not know.

X Q. 40. At that time what was the title of the position that you held with Louis Dejonge & Co.?

A. Clerk.

X Q. 41. Your position was given no more specific designation than clerk?

A. It was not.

79 X Q. 42. And didn't you know, or were you not brought in contact with, any of the salesmen handling the goods of Louis Dejonge & Co.?

A. I knew the salesmen, but can't remember which ones sold fancy box-paper.

X Q. 43. Well, give me the names of the salesmen at that time, namely, the summer and early fall of 1905?

A. All the salesmen whom I recollect as handling fancy paper were H. P. Bensch, W. F. Reuter, H. C. Neblung; that's all.

X Q. 44. Are either of these men now in the employ of Louis Dejonge & Co.?

A. Two of them, H. C. Neblung and W. F. Reuter. Mr. Bensch is dead.

X Q. 45. You state in answer to Q. 10 that for three years prior to the time you became a salesman you had charge of sheets like "Complainant's Exhibit Ruled Off Repeats." I suppose you mean that you had charge of these sheets from the time they were first put on the market until you became a salesman, which was considerably less than three years?

A. Yes; I meant the year 1905.

X Q. 46. And do I understand that these sheets were still on the market as late as April, 1908?

A. They were.

X Q. 47. Who else had charge of these sheets during this period, namely, from the time they came on the market until April, 1908?

A. A man to assist me by the name of H. Bertsch.

X Q. 48. In your answer to Q. 16 you state that you handled more or less of the copies of every edition of these sheets until you became a salesman. How many editions were there?

A. I do not know.

X Q. 49. Can you give me an estimate?

A. Possibly about three or four.

X Q. 50. What do you mean when you state in answer to Q. 21 that these sheets were first put on the market or published

80 by Louis Dejonge & Co. between September 25, 1905, and January 1, 1906? Do you refer to sending out or shipping the sheets for the purpose of filling orders of customers?

A. Yes, that is what I mean.

Cross-examination closed.

Deposition closed.

Signature waived.

Attest:

FANNIE FISK,
Special Examiner.

ALFRED DEJONGE, a witness called on behalf of the complainant, having been duly cautioned and sworn, testified as follows:

Q. 1. What is your name, age, residence and business?

A. My name is Alfred Dejonge; I am 36 years old; live at 109 West 69th Street, New York City, and am Secretary of Louis Dejonge & Company.

Q. 2. They are the complainant in this suit, are they not?

A. Yes.

Q. 3. Please look at the lithographed sheet which I now show you which has been put in evidence in this case and marked "Complainant's Exhibit Ruled Off Repeats," and state whether you have examined the complainant's books for the purpose of ascertaining the date when the first deliveries of sheets like this were made to any person or persons; and if so, please state what such date is?

Question objected to as calling for secondary evidence.

81 A. I have examined the books and find that the first deliveries were made December 5, 1905.

Q. 4. Was the book or books you examined for this purpose the regular book in which entries of this character were made in December, 1905?

Same objection.

A. Yes.

Q. 5. Can that original book be brought here and submitted to the inspection of defendant's counsel if he should wish it?

A. I see no reason why the book could not be brought here.

Q. 6. Will you have it brought if defendant's counsel should request it?

A. Yes.

Q. 7. Will you look at the paper now shown you and state what it is?

A. It is a certified copy of the original certificate of incorporation of Louis Dejonge & Company, the complainant in this case.

Complainant's counsel offers this certificate of incorporation in evidence; but it is stipulated that a true typewritten copy of it may be substituted in the record for it, but that the paper itself shall be produced at any time if desired by defendant's counsel upon reasonable notice to the complainant to that effect.

Direct-examination closed.

Cross-examination by Mr. BUSSER, without waiving objections:

X Q. 8. This corporation of Louis Dejonge & Company is still in existence, is it, and doing business?

A. It is.

X Q. 9. By whom were the sheets referred to in Q. 3 printed?

A. That I cannot say surely, but believe it was the Brett Lithographing Company of this city.

82 X Q. 10. When did you receive the first order for box-paper containing the design like that on the sheet shown you?

A. That I cannot say as I had nothing to do with that department.

X Q. 11. Mr. Frazier has testified that the first delivery from the Brett Lithographing Company to your company was in October, 1905. So far as you know, do your books show anything to the contrary?

A. As far as I know, they do not.

X Q. 12. Mr. Frazier also testified that the original design, together with proofs thereof for the salesmen to sell by, were delivered by the Brett Lithographing Company to your company some time in July or August, 1905. Have you any information on this point?

A. No.

X Q. 13. Mr. Frazier also testified that from these proofs your salesmen sold box-paper containing the design and that the orders received by the Brett Lithographing Company to print depended largely on the sales previously made. Is this correct, so far as you know?

A. As far as I know, this is correct.

X Q. 14. What salesmen had charge of the sale of box-paper embodying this particular design when it was first put upon the market; that is, I would like to have the name or names of the salesman or salesmen who at this time took orders for the paper?

A. I cannot give you the names of the salesman or salesmen who handled this paper as I had nothing to do with the management of that department.

X Q. 15. Was it your duty to keep the books containing the entry of delivery to which you have testified?

A. No.

X Q. 16. Who did keep the books at that time?

A. I do not know.

83 By Mr. BUSSER: Mr. Busser objects to this deposition in view of the answers of the witness on cross-examination as incompetent, first, because the witness is not in charge of the books to which he has referred, and, secondly, because the witness does not possess the knowledge to enable him to give full information with respect to the transaction culminating in the alleged delivery of December 5, 1905. The objection to his testimony as secondary evidence is also renewed. His testimony with respect to the first deliveries of the box-paper in question is also objected to as irrelevant, particularly in the absence of any proof as to first publication and of information bearing upon that point.

Cross-examination closed.

Redirect examination:

R. D. Q. 17. Is the business of Louis Dejonge & Company, the complainant, a large one, and are there in it many different departments so that you might not have knowledge as to transactions in those departments which do not come under your own charge?

A. Yes.

Deposition closed.

Signature waived.

Attest:

FANNIE FISK,
Special Examiner.

84 NOTE.—This copy of certified copy of certificate of incorporation of Louis Dejonge & Company belongs to the foregoing deposition of Alfred Dejonge.

Copy.

UNITED STATES OF AMERICA,
State of New York:

By John S. Whalen, Secretary of State and Custodian of the Great Seal Thereof.

It is hereby certified, That James L. Whalen was, on the day of the date of the annexed Certificate and Attestation, Deputy Secretary of State of the State of New York, and duly authorized by the laws of said State to make such Attestation and Certificate and to perform the duties belonging to the Secretary of State is in his own proper handwriting, Certificate, in like manner as said Secretary of State; that the said Certificate and Attestation are in due form and executed by the proper officer; that the seal affixed to said Certificate and Attestation is the seal of office of the Secretary of State of the State of New York; that the signature thereto of the said Deputy Secretary of State, is in his own proper handwriting, and is genuine; and that full faith and credit may and ought to be given to his official acts; and, further, that the Secretary of State is the Custodian of the Original Certificate of Incorporation so certified and attested and Custodian of the Great Seal of said State hereunto affixed.

85 In testimony whereof, The Great Seal of the State is hereunto affixed.

Witness my hand at the City of Albany, the ninth day of March in the year of our Lord one thousand nine hundred and eight.

[The Great Seal of the State of New York.]

(Signed) JOHN S. WHALEN,
Secretary of State.

We, the undersigned, all being persons of full age and at least two-thirds being citizens of the United States and at least one of us a resident of the State of New York, desiring to form a stock corporation pursuant to the provisions of the Business Corporations Law of the State of New York, do hereby make, sign, acknowledge and file this certificate for that purpose as follows:

First. The name of the proposed corporation is "Louis Dejonge & Company."

Second. The purposes for which it is to be formed are to manufacture, import and sell paper and leather and articles in whole or in part made of paper or leather; and to manufacture, import and sell kindred articles and such other articles as may be conveniently handled in connection with the foregoing, and to act as selling agent for other manufacturers of like articles.

Third. The amount of the capital stock is Two hundred thousand dollars ($200,000).

Fourth. The number of shares of which the capital stock shall consist shall be Two thousand (2,000), each of said shares being of the par value of One hundred dollars ($100) and the amount
86 of capital with which said corporation shall begin business is Two hundred thousand dollars ($200,000).

Fifth. Its principal office is to be located in the Village of Millbrook, in the Township of Washington, in the County of Dutchess, in the State of New York.

Sixth. Its duration is to be fifty years.

Seventh. The number of its directors is to be five. The directors need not be stockholders unless so provided by the By-laws.

Eighth. The names and post office addresses of the directors for the first year are as follows:

Names.	Post-office addresses.
Charles F. Zentgraf,	7 Court Street, Stapleton, New York City, New York.
Louis Dejonge, Jr.,	139 St. Pauls Avenue, Stapleton, New York City, New York.
Alfred Dejonge,	15 Smith Terrace, Stapleton, New York City, New York.
Ernest W. Zentgraf,	149 St. Pauls Avenue, Stapleton, New York City, New York.
Max Emil Dejonge,	Fitchburg, Massachusetts.

Ninth. The names and post office addresses of the subscribers and a statement of the number of shares of stock which each agrees to take in the corporation are as follows:

Names.	Post-office addresses.	No. of shares.
Charles F. Zentgraf,	7 Court Street, Stapleton, New York City, New York	1,170
Louis Dejonge, Jr.,	139 St. Pauls Avenue, Stapleton, New York City, New York	455
Alfred Dejonge,	15 Smith Terrace, Stapleton, New York City, New York	125
87 Ernest W. Zentgraf,	149 St. Pauls Avenue, Stapleton, New York City, New York	125
Max Emil Dejonge,	Fitchburg, Massachusetts	125

In witness whereof, we have made, signed and acknowledged this certificate in duplicate this first day of April, 1905.

CHAS. F. ZENTGRAF.
LOUIS DEJONGE, JR.
ALFRED DEJONGE.
ERNEST W. ZENTGRAF.
M. EMIL DEJONGE.

STATE OF NEW YORK,
County of New York, ss:

On this first day of April, 1905, before me personally came Charles F. Zentgraf, Louis Dejonge, Jr., Alfred Dejonge, Ernst W. Zentgraf and Max Emil Dejonge, to me known and known to me to be the persons described in and who made and signed the foregoing certificate, and they severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

WILLIAM W. PELLES,
Comr. of Deeds, City of New York.

(Endorsed:) Certificate of Incorporation of Louis Dejonge & Company. Tax for privilege of organization of this Corporation, $100, under Chapter 448, Laws of 1901. Paid to State Treasurer before Filing. State of New York, Office of Secretary of State, Filed and Recorded Apr. 3, 1905. J. B. H. Mongin, Deputy Secretary of State.

88 STATE OF NEW YORK,
Office of the Secretary of State, ss:

I have compared the preceding with the original Certificate of Incorporation of "Louis Dejonge & Company" filed and recorded in this office on the 3rd day of April, 1905, and do hereby certify the same to be a correct transcript therefrom and the whole of said original.

Witness my hand and the seal of office of the Secretary of State, at the City of Albany, this ninth day of March, one thousand nine hundred and eight.

[Seal of the Secretary of State.]

(Signed) JAMES L. WHALEN,
Deputy Secretary of State.

89 HENRY A. HEBERT, a witness called on behalf of the complainant, having been duly cautioned and sworn, testified as follows:

Q. 1. What is your name, age, residence and occupation?

A. My name is Henry A. Hebert; I am 45 years old, live in New York City, and am a lithographer.

Q. 2. Are you in the employ of any lithographing company in this city?

A. I am foreman of the Transfer and Printing Departments of the Brett Lithographing Company.

Q. 3. Please look at the lithographed sheet now shown you marked in this case "Complainant's Exhibit Ruled Off Repeats" and state whether since you have been foreman as described for the Brett Lithographing Company sheets like this were printed by that company?

A. Yes, that's our work; that's our sheet. Sheets like that were printed by that company since I have been foreman.

Q. 4. Do you know for whom they were printed?
A. Louis Dejonge & Company.
Q. 5. Can you state whether more than one edition of sheets like this exhibit were printed by the Brett Lithographing Company for Louis Dejonge & Company?
A. Yes, there have been more than one edition printed of this subject. I don't know how many, possibly three; well, I am sure of three at the least.
Q. 6. Was the first edition of them printed under your charge as foreman?
A. Yes.
Q. 7. And all the subsequent editions also?
A. Yes.
Q. 8. I call your attention to the copyright notice "Copyright 1905 by Louis Dejonge & Co." which is on this exhibit sheet, and will ask you to state upon how many copies of all these various editions this notice appeared?
A. That copyright appears on every sheet of every edi-
90 tion that was printed; that means every perfect sheet. Every sheet that was delivered that copyright was on.
Q. 9. State at what stage of the process of making these sheets this notice was put on them?
A. That copyright is put on when the brown transfer is made and printed with the rest of the sheet, all in one form.
Direct examination closed.

Cross-examination by Mr. BUSSER:

X Q. 10. How long have you been foreman of the Transfer and Printing Departments of the Brett Lithographing Company?
A. About twelve years.

Cross-examination closed.
Deposition closed.
Signature waived.

Attest:
FANNIE FISK,
Special Examiner.

Adjourned to Monday, November 2, 1908, at 11 A. M.

91 NEW YORK, *Nov.* 2, 1908.

Counsel for respective parties met pursuant to adjournment at eleven o'clock in the forenoon this 2nd day of November, 1908, and thereupon the further prima facie proofs for complainant duly proceeded.

Present: Counsel as before.

CHARLES I. MCLAUGHLIN, a witness called on behalf of the complainant, having been duly cautioned and sworn, in answer to the questions proposed to him testified as follows:

Q. 1. What is your name, age, residence and business?
A. My name is Charles I. McLaughlin; I am 55 years old, live in Brooklyn, and am a paper manufacturer.

Q. 2. Are you connected with any concern engaged in the paper manufacturing business?

A. I am.

Q. 3. With what concern?

A. Louis Dejonge & Company.

Q. 4. Is that the complainant in this suit?

A. Yes.

Q. 5. In what capacity are you engaged with Louis Dejonge & Company?

A. As Treasurer and General Supervisor of the Accounting Department.

Q. 6. About how long have you been connected with Louis Dejonge & Company?

A. About thirty-five years.

Q. 7. What were your duties with that company in the year 1905?

A. I was cashier and head of the bookkeeping department.

Q. 8. Will you please look at the lithographed sheet now shown you and state whether or not you recall this design as one which was lithographed and sold by Louis Dejonge & Company during most of the last three years or so?

92 Witness is shown "Complainant's Exhibit Ruled Off Repeats."

A. I recognize it, yes.

Q. 9. During that time has that design had a stock number; and if so, can you state what it is?

A. That design was known as our No. Q1371.

Q. 10. Have you any means of stating definitely when the first orders from any customers of Louis Dejonge & Company were received for this particular design of paper, Q1371?

A. I have.

Q. 11. What are those means?

A. The original book in which the orders received were placed on receipt of the orders.

Q. 12. Is that original order book now present?

A. Yes, sir.

Q. 13. Before I ask you to refer to this book I will inquire in whose charge it was during all the period covered by the orders in it?

A. In my charge.

Q. 14. And in whose charge is it at the present time?

A. In my charge.

Q. 15. By whose direction or under whose charge were the respective orders it contains put in it?

A. By my direction.

Q. 16. Now please state whether the orders in the book are the original orders just as they were received by Louis Dejonge & Company from their respective salesmen?

A. They are.

Q. 17. Also please state how near to the dates of these orders respectively they were pasted into this book?

A. They were pasted in within forty-eight hours after their receipt, which is one of our strict rules.

Q. 18. Will you please look at this book and state whether or not it contains the first order which was received by Louis Dejonge & Company for this paper Q1371; and if so, please tell us what its date is?

A. It does; an order from the National Papetrie Co., Springfield, Mass., Oct. 24, 1905.

93 Q. 19. That is the very first order for this paper, is it?

A. That is the first order we received.

This original order referred to by the witness is offered in evidence by complainant's counsel; and it is agreed between the respective counsel that a copy of it may be made a part of the record herein with the same force and effect as if it were the original; and complainant's counsel agree that defendant's counsel shall be at liberty to inspect the original order book at any time upon reasonable notice to that effect.

Q. 20. Have you any means of stating at what time the first deliveries of this paper Q1371 were made to fill the order of any customer?

A. I have.

Q. 21. What are those means?

A. Original book of entry.

Q. 22. Is that book also now present?

A. It is.

Q. 23. Please state under whose charge that book was during all the period covered by the entries in it?

A. Under my charge.

Q. 24. And under whose charge is it now?

A. My charge.

Q. 25. By whose direction were the entries in it made?

A. By my direction.

Q. 26. Please state in what manner the entries in it were made—I mean in what kind of writing and who made them?

A. The charge was made by our regular billing clerk, using a Fisher billing machine, by which the entry and bill were made simultaneously in typewriting form.

Q. 27. How near were these entries made to the actual dates of the facts and statements to which they refer?

A. Immediately.

Q. 28. Then this book here present with these typewritten entries in it is the original book, as I understand you?

A. Yes, the original book.

94 Q. 29. Now, will you please refer to the book and say whether it contains the date of the first delivery of this paper Q1371, to any customer of Louis Dejonge & Company; and if it does, please state what that date is?

A. In book known as "Out of Town No. 1," on page 1601, will be found the original charge made to the Boston Paper Box Company, of Boston, Mass., on December 5, 1905, representing the first shipment, which was a sample lot billed to this company. This was only one sheet.

Q. 30. Does the book state how soon after that deliveries of this same paper in larger quantities were made?

A. The same book and same folio will show a number of shipments made of this same paper to various other concerns, in small quantities only, as these were the first sheets out and were sold for the manufacturers to prepare their samples.

Q. 31. Can you give the date or dates of these shipments?

A. The same date, December 5, 1905. On this date we made shipments of sample sheets as billed to thirteen—about thirteen different concerns.

Q. 32. State whether these sheets last referred to were sent to these customers pursuant to orders from them?

A. They were.

Q. 33. Now, can you state from this book how soon after these various samples were sent, larger quantities than samples of this Q1371 paper were sent to any customer or customers?

A. Shipments were made right along then, within a few weeks after the samples were sent.

Counsel for complainant offer in evidence the entries referred to by the witness in this book—which are contained in the copy entries which will form part of the record herein; and it is agreed between the counsel that this copy may have the same force and effect as if in place of it the original entries were before the court; and it is
95 agreed that defendant's counsel at any time upon reasonable notice shall have access to this original book of entry.

Q. 34. Are you able to state who was the first salesman who went out for Louis Dejonge & Co. with samples of this paper to obtain orders for it; if so, who was it?

A. I am. Mr. Hermann P. Bensch.

Q. 35. Can you also state when he first started out with these samples?

A. October 22nd or 23rd, 1905. I gave him the money to go east on the trip on Saturday, the 21st of October, and we heard from him on the 24th; so he went some time between those two dates.

Direct examination closed.

Cross-examination by Mr. BUSSER:

X Q. 36. How do you fix the date October 21, 1905, when you advanced money to Mr. Bensch?

A. By reference to my cash book, in which the entry for the payment appears in my own handwriting, and the object for which the money was given was clearly defined.

X Q. 37. How do you know that it was on the trip following the receipt of this money that Mr. Bensch first took with him samples of the paper we have been inquiring about?

A. Because the samples of this particular paper were not ready on Mr. Bensch's previous trip, which was four weeks before.

X Q. 38. How do you know the samples of this paper were not ready four weeks before?

A. It was strongly impressed on my mind owing to the fact that

Mr. Bensch thought he was a little late in getting on the road with these samples, so that I clearly remember and fix the date as the time specified.

X Q. 39. What do you mean by "these samples;" are you referring to the samples of the design that has been shown you or
96 to samples of all the papers designated by the letter and numerals appearing on the order of October 24, 1905, offered in evidence?

A. All the papers represented by the letter and numerals, which included the sheet in question.

X Q. 40. Did the different colors of the design shown you have any different designations, or were they all known as Q1371?

A. That I couldn't tell you, as I only recognize the design of the pattern; not being conversant with the stock, I am not in a position to say whether it was printed in other colors or not. If the design was printed in different colors, it would only be the background which would be colored differently; the colors of the design itself would remain the same.

X Q. 41. If the design in question were printed on different colored backgrounds, would it be differently numbered?

A. It would.

X Q. 42. Do you know whether the design in question was printed on different colored backgrounds?

A. I do not.

X Q. 43. Does the order book that you produced contain any orders of any salesmen other than Mr. Bensch?

A. No.

X Q. 44. Have you looked through the order book of any other salesmen to locate the first order received for Q1371?

A. No, as Mr. Bensch had exclusive charge of this department and did not permit the other salesmen to offer or exhibit for sale these papers until they were ready for the market; and immediately that they were Mr. Bensch proceeded to visit the trade himself, after which the samples were then given to our other salesmen to be offered for sale.

X Q. 45. Does the "Out of Town No. 1" book show all the shipments or deliveries of goods sold by Louis Dejonge & Co. on the dates appearing therein?

A. No, only in the paper department and all the other departments, with the exception of our Bookbinders' Supply Depart-
ment.

97 X Q. 46. Then I undersand that the "Out of Town Book No. 1" contains a record of every shipment and delivery of fancy box-paper to customers in or out of New York City within the period represented by the dates at the top of the sheets or pages?

A. No, they represent charges only to out-of-town customers, as indicated by the name of the book. For charges of goods delivered in New York City, all entries are made in a book known as "City Sales Book."

X Q. 47. Then the sales of fancy boxpaper, or charges for the same, to customers in the City of New York would not appear in the book that you have produced?

A. No.

X Q. 48. Does the "Out of Town" Book No. 1 that you have produced contain the record of the shipment of the goods set forth in the order of October 24th, offered in evidence?

A. No, it does not. The first of these shipments was not made until after the date this book was closed, which was January 26, 1905. We only put 2,000 sheets in a book. Of course, in saying these shipments were not made until the time stated, I am not including the shipment before spoken of to the Boston Paper Box Co. That, as I have stated, was on December 5, 1905—nor of the other thirteen on that same date.

X Q. 49. Were the samples sent to the Boston Paper Box Co. on December 5, 1905, sent for the purpose of filling partly or wholly a purchase of the Boston Paper Box Co?

A. They were.

X Q. 50. Was this order from the Boston Paper Box Co., as well as the orders by reason of which the other thirteen shipments of December 5, 1905, were made, orders taken by Mr. Bensch, and do they appear in the order book that you have produced this morning?

A. They do.

X Q. 51. Will you show me the Boston Paper Box Co. order?

A. I refer to page 117 of the Order Book.

98 X Q. 52. What were the samples like that Mr. Bensch took with him when he started out to sell this paper?

A. He had a good-sized sample of all of the line of fancy papers, including the Q1371.

X Q. 53. Well, was the sample a whole sheet or a single repeat or part of a sheet?

A. Part of a sheet.

X Q. 54. Mr. Frazier, of the Brett Lithographing Company, has testified that when the original design was sent to you there was also sent proofs, probably half a dozen, which by reason of the fact that there were cross-marks at their tops and sides incident to their being made, were unsalable, but were used by the salesmen of Louis Dejonge & Co. to sell by, and that these proofs were delivered in July or August of 1905. Have you any information as to whether or not this testimony was correct; and if not, in what respects it was incorrect?

A. No, I can give no information on this line, as it was not within my jurisdiction, and I am not capable of judging.

Cross-examination closed.

Redirect examination:

R. D. Q. 55. Have you any knowledge as to whether there was any notice of any kind on these samples which Mr. Bensch took out as you have stated; I am referring to the paper Q1371?

A. No.

Deposition closed.
Signature waived.

Attest:

FANNIE FISK,
Special Examiner.

99 [Copy entries referred to in foregoing deposition of Charles I. McLaughlin.]

No. 3918. October 24th, 1905.

National Papeterie Co.,

Springfield, Mass.

Louis Dejonge & Company, New York.

Transmitted by Bensch

Terms: as usual

Ship as usual January 1st, 1906.

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30 Sht 1906 Fancy Ea:

Q1368 — Q1370 — Q1376
Q1374 — Q1345 — Q1354
Q1334 — Q1335 ..... $75.00

Q1362 — Q1371 — Q1373
Q1372 — Q1341 — Q1346
Q1356 — Q1357 — Q1352
Q1337 — Q1328 — Q1332
Q1333 ..... 65.00

and one sheet of each of above in addition on November 15th.

/651 Sht in all/

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100 1601 Out of Town Sales Sheet December 5, 1905.

Quantity.	Description.								Price.	Amount.	Total.
	Boston Paper Box Co.,										
84100	394 Atlantic Av., Boston, Mass.										
C. O. D. & Charges.								N. Y. B. D. Exp.			
1 Sht Fancy Ea	Q1328	1332	1333	1337	1341	1342	1346				
	1347	1351	1352	1356	1357	1362	1361		65.00 rm	2.21	
					1371	1372	1373				
	Q1329	1330	1331	1334	1335	1336	1338	1339			
	1340	1343	1344	1345	1348	1349	1350	1353	75.00 rm	4.50	
	1354	1355	1358	1359	1360	1363	1364	1365			
	1374	1375	1376	1377	1378	1379					6.71
	A. H. Alger & Co.,										
84191	Middleboro, Mass.,										
30 days								N. Y. B. D.			
1 Sht Ea	Q1328	1332	1337	1342	1352	1357	1367	**1371**	65.00	**1.17**	
	1373										
	Q1329	1335	1339	1345	1354	1358	1360	1368	75.00	1.65	
	1377	1378	1379								2.82

84192

Chas. A. Brackett,
144 High St., Boston, Mass.

3 mos.

1 Sht Ea	Q1328	1332	1333	1337	1341	1342	1346	1347			
	1351	1352	1356	1357	1361	1362	1366	1367	1371	65.00	2.47
	1372	1373									
	Q1329	1330	1331	1334	1335	1336	1338	1339			
	1340	1343	1344	1345	1348	1349	1350	1353			
	1354	1355	1358	1359	1360	1363	1364	1365		75.00	4.95
	1368	1369	1370	1374	1375	1376	1377	1378	1379		7.42

F84194

W. S. Barnes & Son,
301 Congress St., Boston, Mass.,

60 days

N. Y. B. D. Exp.

1 Sht Ea	Q1328	1337	1332	1352	1356	1342	1347	1371	1361	65.00	1.30
	Q1373										
	Q1339	1379	1354	1350	1344	1345	1364	1335		75.00	1.20
											2.50

December 5, 1905.

National Papeterie Co.,
Springfield, Mass.

Ad. Exp.

1 Sht Ea	Q1368	Q1370	Q1376	Q1374	Q1345	Q1354	Q1334	Q1335	75.00	1.20
		Q1362	Q1371	Q1373	Q1372	Q1341	Q1346			
	Q1356	Q1357	Q1352	Q1337	Q1328	Q1332	Q1333		65.00	1.69
										2.89

101

December 5, 1905.

The Buedingen Box & Litho Co.,
Rochester, N. Y.

Nat. Exp.

1 Sht Ea	Q1364	1363	1369	1329	1330	1331	1334				
	1335	1336	1338	1339	1340	1353	1354				
	1355	1359	1358	1374	1375	1376	1377	1378	1379	75.00	4.35
	1348	1349	1350	1343	1344	1345					
	Q1362	1366	1367	1328	1332	1333	1337	1351			
	1356	1357	1371	1372	1373	1346	1347	1342		65.00	2.08
											6.43

Dec. 5, 1905.

E. N. Lorscheider Co.,
Rochester, N. Y.

Nat. Exp.

4 Sht Ea	Q1328	1332	1333	1337	1341	1342	1346	1347			
	1351	1352	1356	1357	1371	1372	1373	13		65.00	7.80
	Q1329	1330	1331	1334	1335	1336	1338	1339			
	1340	1343	1344	1345	1348	1349	1350	1353			
	1354	1355	1358	1359	1360	1374	1375	1376		75.00	16.20
	1377	1378	1379								24.00

Dec. 5, 1905.

Holliday Box Co.,
Detroit, Mich.

						Nat. Exp.				
2 Sht Fey Ea	Q1328	1332	1333	1337	1341	1342	1346			
	1347	1351	1352	1356	1357	1361	1362	65.00	4.94	
	1366	1367	1371	1372	1373					
	Q1329	1331	1331	1334	1335	1338	1339			
	1340	1343	1344	1345	1348	1350	1353			
	1354	1355	1358	1359	1360	1363	1364	75.00	9.60	
	1365	1368	1369	1370	1374	1375	1376			
	1377	1378	1379							
									——	14.54

December 5, 1905.

W. M. Lowney Co.,
Boston, Mass.

						N. Y. B. D. Exp.				
2 Sht Ea	Q1328	1332	1333	1337	1341	1342	1346			
	1347	1351	1352	1356	1357	1361	1362	65.00	4.94	
	1366	1367	1371	1372	1373					
	Q1329	1330	1331	1334	1335	1336	1338			
	1339	1340	1443	1344	1345	1348	1349	1350		
	1350	1353	1354	1355	1358	1359	1360	1363	75.00	9.90
	1364	1365	1368	1369	1370	1374	1375	1376		
	1377	1378	1379							
									——	14.84

102

Dec. 5, 1905.

Place Box Co.,
Norfolk St., Cambridge, Mass.

						N. Y. B. D. Exp.				
1 Sht Ea										
Q1328	1332	1333	1337	1341	1342	1346	1347	1351		
1352	1356	1357	1371	1372	1373	1361	1362	1366	65.00	2.47
1367										
1329	1330	1331	1334	1335	1336	1338	1339	1340		
1343	1344	1345	1348	1350	1353	1354	1355	1358		
1359	1360	1374	1375	1376	1377	1378	1363	1364	75.00	4.65
1365	1368	1369	1370							
									——	7.12

Dec. 5, 1905.

Whitney & Co.,
Leominster, Mass.

							N. Y. B. D. Exp.					
2 Sht Ea												
Q1330	1335	1336	1349	1353	1355	1358	1359	1370	1374	75.00	3.90	
		1376	1377	1378								
	Q1328	1333	1341	1347	1352	1357	1367	1371	1373	65.00	2.34	
2 Sht Ea												
Q1371		1373										
		1376										
										65.00	52	
										75.00	30	
											——	7.06

Dec. 5, 1905.

Fred Bergner & Co.,
Balt., Md.

U. S. Exp.

2 Sht Ea	Q1379	1358	1359	1360	1353	1338	1339	1343	75.00	2.40
							Q1371	Q1373	65.00	.52
										2.92

December 5, 1905.

White & Wyckoff Mfg. Co.,
Holyoke, Mass.,

Ad. Exp.

6 Sht Ea	Q1379	1378	1377	1376	1374	1360	1359		75.00	12.60
	1358	1355	1353	1340	1338	1334	1329			
	Q1373	1371	1357	1356	1351	1337	1333	1332		
								1328	65.00	7.02
										19.62

103 WILLIAM L. DRUMMOND, a witness called on behalf of the complainant, having been duly sworn, testified as follows:

Q. 1. What is your name, age, residence and business?

A. My name is William L. Drummond; I am 37 years old; live at 124 East End Avenue, New York City, and am an expert in photography.

Q. 2. Where do you carry on your business?

A. 50 Fulton Street, New York City.

Q. 3. How long have you been an expert in photography?

A. Twenty-five years.

Q. 4. Please look at the certified copy of application for copyright registration now shown you marked "Complainant's Exhibit Copyright Certificate," and examine the photograph annexed thereto and state whether you recognize that as your own work?

A. I do.

Q. 5. At whose request did you make that photograph?

A. Brett Lithographing Company.

Q. 6. How are you able to state that this is your own work?

A. By the marks outside of the photograph representing my planboard, as well as the tacks; and besides that, I remember the work.

Q. 7. Will you please look at the framed picture now shown you marked "Complainant's Exhibit Copyrighted Painting," and state whether or not the photograph just shown you is a photograph of that painting?

A. They are one and the same.

Q. 8. State whether or not you made this photograph from this painting?

A. I did.

Direct-examination closed.

Cross-examination by Mr. BUSSER:

X Q. 9. Did you do the work yourself?

A. I did.

104 X Q. 10. Did the painting have a frame around it when it was given to you?

A. It did not.

X Q. 11. Can you state certainly whether the thing that you photographed was a painting or a colored lithograph of a painting similar to what I hand you?

Witness is shown a colored lithograph.

A. It was a water-color sketch.

X Q. 12. You are sure it was not a colored lithograph?

A. Sure.

Cross-examination closed.

Redirect examination.

R. D. Q. 13. What water-color sketch was it?

A. It was this painting (referring to "Complainant's Exhibit Copyrighted Painting").

Deposition closed.

Signature waived.

Attest:

FANNIE FISK,
Special Examiner.

FRED C. BRION, a witness on behalf of the complainant, and being duly sworn, testified as follows:

Q. 1. What is your name, age, residence and business?

A. My name is Fred C. Brion; I am 52 years old, live at 1335 Bergen Street, Brooklyn, and am a lithographer—superintendent of the Brett Lithographing Company, in the city of New York.

Q. 2. How long have you been superintendent there?

A. About twelve years?

105 Q. 3. Is the whole work of the business under your charge?

A. Yes.

Q. 4. Please look at the lithographed sheet now shown you marked "Complainant's Exhibit Ruled Off Repeats," and state whether the Brett Lithographing Company printed sheets like that for Louis Dejonge & Co.?

A. Yes, we printed sheets like that.

Q. 5. If the copyright notice "Copyright 1905 by Louis Dejonge & Co." which appears in one corner of this sheet, were printed on the back of the sheet against or upon each of the repeats of the design, about how much, if at all, would printing the notice there add to the cost of printing?

A. Why, it would add about 12% more.

Q. 6. What tendency would printing such notices on the back have to affect the appearance of the front or face of the sheet?

A. Well, if it were printed after the face was printed it would have a tendency to dull the colors.

Q. 7. What would be the proper way in doing such lithographing work as this sheet represents—to print such notices on the back of the sheet after the face was printed or before it was printed?

A. Never heard of a copyright being on the back of a picture or print.

Q. 8. Do you apply that generally to all lithographic work?

A. Yes.

Direct-examination closed.

No cross-examination.

Signature waived.

Attest:

FANNIE FISK,
Special Examiner.

106 HENRY B. JANES, recalled for the complainant, testified as follows:

Q. 1. Were you ever in the employ of Louis Dejonge & Co., the complainant in this case?

A. I was.

Q. 2. For how long a time?

A. Twenty-five years and sixty-one days.

Q. 3. When did that employment terminate?

A. 31st day of December, 1905.

Q. 4. While you were in the employment of Louis Dejonge & Co. were you acquainted with Herman P. Bensch, one of the salesmen there, who is now dead?

A. I was.

Q. 5. About how long did you know him?

A. From seven to ten years.

Q. 6. I show you the lithographed sheet marked "Complainant's Exhibit Ruled Off Repeats" and will ask you to state whether or not Mr. Bensch at any time talked with you in regard to the design represented in this exhibit; if he did, please state the circumstances under which he talked to you about it?

A. He did. From time to time Mr. Bensch was in the habit of showing me different new designs, among which was this one. He did this with the idea of consulting with me in regard to them as regards patterns, colorings, etc.

Q. 7. At the time he talked with you about this particular design, in what form was the design—was it on a finished printed sheet or in some other form?

A. In the form of a proof.

Q. 8. Did you see any such proof more than once; if so, about how many times?

A. Several times; I am unable to state how many.

Q. 9. State whether or not you saw the proof of this design after it was finally approved and accepted as a correct proof?

A. I did.

107 Q. 10. Are you able to state what Mr. Bensch did with these proofs which he showed you when he was not talking with you about them?

A. They were kept locked in his desk.

Q. 11. When finally the proof of this design was accepted as correct, was it marked in any way; and if so, what mark was put on it and how was it put on?

A. It was marked "Copyright Louis Dejonge & Co. 1905," and was marked with a rubber stamp.

Q. 12. About what season in the year when Mr. Bensch showed you these proofs was it that Mr. Bensch first went away on a trip to obtain orders for the paper having the design shown in the proofs?

A. The latter part of the year.

Q. 13. And what year was that?

A. It was 1905.

Q. 14. Now, to the best of your recollection how many weeks or months before Mr. Bensch went away on this first trip did he show you the proofs of this design?

A. I should say about two months, or possibly earlier.

Q. 15. What are you able to say about who, if anybody, saw any of these proofs during the period you have spoken of except Mr. Bensch and yourself?

A. To my best knowledge and belief no one else saw them, except possibly Mr. Charles F. Zentgraf, the head of the firm.

Q. 16. What was Mr. Bensch's habit in respect to showing such proofs to other salesmen previous to the finished sheet being ready to be offered for sale?

A. He was very secretive with all new designs until such time as they were ready to be delivered to the salesmen and for market. He was not in the habit of showing such proofs to other salesmen or to other persons than myself.

Q. 17. When Mr. Bensch went off on his first trip to obtain orders for the line of papers of which the design shown in the exhibit
108 herein referred to was one, what, if anything, did he take with him for the purpose of showing the design of this sheet about which you have been asked?

A. He took a proof.

Q. 18. State whether or not that proof constituted a sample of the design?

A. It did.

Q. 19. How was that sample prepared for being shown?

A. It was pasted on a piece of gray board.

Q. 20. Was there any marking upon this sample or upon this gray board; if so, what was it?

A. It was stamped with a rubber stamp "Copyright Louis Dejonge & Company, 1905."

Q. 21. After Mr. Bensch had taken out this sample or samples marked in this way and had returned from his trip, were any similar samples given to any other salesmen for the obtaining of orders for the paper?

A. Yes.

Q. 22. Is it within your knowledge how these samples were marked, if at all?

A. They were the same as those taken by Mr. Bensch.

Q. 23. Now, will you please tell us what was your position with Louis Dejonge & Company at the time Mr. Bensch showed you the proofs you have spoken of and why he consulted with you about them?

A. I had charge of the Colored Paper Department, also all mail pertaining to this department. His orders were always given to me to be attended to.

Q. 24. And did he consult you about proofs of other designs for fancy paper as well as this one that you have been testifying about?

A. Yes.

Cross-examination by Mr. BUSSER:

X Q. 25. How large were these proofs that Mr. Bensch showed you; that is, were they of the size of the sheet shown you or of the size of a single repeat of the design?

A. About the size of a repeat of the design.

109 X Q. 26. How many proofs of the design in question did he show you?

A. I think about five finished proofs.

X Q. 27. On five different occasions?

A. No, all at one time.

X Q. 28. How many unfinished proofs did he show you?

A. Probably two or three.

X Q. 29. On how many occasions?

A. Two or three times.

X Q. 30. At about the time the proofs of the design shown you were being prepared, about how many proofs of other designs for fancy box paper were being prepared?

Q. Quite a number of designs.

X Q. 31. How about these other designs; did he show you different proofs at different times of each of these other designs?

A. He did.

X Q. 32. Have you any exact recollection of the number of proofs of the particular design shown you and of the number of times proofs of this particular design were shown you, or are you basing your testimony upon your recollection generally with relation to all the designs for fancy box paper that were gotten out about the same time as the particular design shown you?

A. I remember this particular design, and I recollect stating to Mr. Bensch that although it was a very beautiful design, I thought it was entirely too large. I cannot state positively how many proofs of this particular design were shown me, but I know that it was shown me at different times.

X Q. 33. Now, I would like you to tell me about what time elapsed between the time that he showed you the first unfinished proof and the time that he showed you the five finished proofs of this particular design, and I wish to have your recollection independ-

ent of what you recall about the other designs gotten out about the same time?

110 A. I think it was about two months. I cannot state anything further in regard to this design than the testimony I gave in the previous answer.

X Q. 34. Will you swear positively that it was at least as long as two months?

A. No, I cannot swear positively; I think it was about two months.

X Q. 35. Will you swear positively that it was at least as long as a month?

A. I will.

X Q. 36. Will you swear positively that it was at least as long as six weeks?

A. No, I cannot.

X Q. 37. Is there anything in the way of circumstances or written data, aside from your own unaided recollection, that enables you to swear positively that the period in question was as long as one month, but will not enable you to swear positively that it was as long as six weeks?

A. I think it must have been nearer six weeks than one month to enable the lithographer to have had sufficient time to do the work in time to deliver it.

X Q. 38. Is that what you are basing your recollection upon—the length of time that it would take the lithographer to do the work?

A. Not entirely so, as most proofs of this line were in before that time and this particular design was one of the last to be made.

X Q. 39. How many samples of this design did Mr. Bensch take with him when he first started out to sell box paper embodying the design?

A. To my best knowledge, one proof.

X Q. 40. Do I understand that all of the five finished proofs that were shown you were marked "Copyright"?

A. They were.

X Q. 41. Were any of the unfinished proofs marked "Copyright"?

A. I don't think so; I never saw anything but the finished proofs marked "Copyright."

X Q. 42. Where was the copyright mark placed on the finished proofs?

A. It was stamped on the gray cardboard on which the proof was pasted.

Cross-examination closed.

111 Redirect examination:

R. D. Q. 43. Will you please state again what was the wording of the copyright notice on these finished proofs?

A. "Copyright Louis Dejonge & Company, 1905."

R. D. Q. 44. May it have been "Copyright 1905, Louis Dejonge & Co." or "Company"?

A. It may have read the other way—that is, the way the question puts it.

Deposition closed.

Signature waived.

Attest:

FANNIE FISK,
Special Examiner.

HENRY J. SUHRBIER, a witness called on behalf of the complainant, having been duly sworn, testified as follows:

Q. 1. What is your name, age, residence and occupation?

A. My name is Henry J. Suhrbier; I am twenty-four years old, live in Union Hill, N. J., and am a law clerk for Goepel & Goepel.

Q. 2. They are the solicitors and of counsel for the complainant in this case.?

A. Yes, sir.

Q. 3. Please state whether you at any time anywhere bought any lithographed sheets like the sheet now shown you marked "Exhibit Defendant's Product;" if so, when and where, and how many such sheets did you buy?

A. I did. I purchased them from Breuker and Kessler Company, Philadelphia, on August 9, 1906, and the twelve sheets I purchased were exactly like the one now shown me.

112 Q. 4. Where were you and where were the sheets you purchased at the time you bought them?

A. I was in Philadelphia, and purchased them direct from Breuker and Kessler Company at their office, corner of Seventh and Arch Streets.

Q. 5. Did you pay for these twelve sheets?

A. Yes, sir.

No cross-examination.

Counsel for defendant stipulates that the defendant is, and was at and for some time prior to the filing of the bill in this cause, a corporation duly created and organized in accordance with the laws of Pennsylvania under the name of Breuker & Kessler Company, and that said defendant corporation now has, and at the time of the filing of the bill herein had, its office and principal place of business in the City of Philadelphia in the State and Eastern District of Pennsylvania, and was then and still is engaged in business as lithographers and publishers.

To Q.'s 6, 7 and 8 propounded to the witness Wood, Q. 20 propounded to the witness Low, Q. 14 propounded to the witness DuBond, the right to object to which has been reserved, Mr. Busser objects on the ground that they are irrelevant and immaterial for

the reasons specified in the objection to Q. 24 of the testimony of Charles W. Frazier.

Signature waived.

Attest:

FANNIE FISK,
Special Examiner.

Complainant rests.

113 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Fannie Fisk, acting in the foregoing entitled cause as Special Examiner by consent, hereby certify that on the herein above mentioned days respectively herein before set forth, at the office of Messrs. Goepel & Goepel, solicitors for the herein above named complainant, at No. 290 Broadway in the City of New York in the said District, I was attended by Carl P. Goepel, Esq., and S. D. Cozzens, Esq., of counsel for the aforesaid complainant, and Frank S. Busser, Esq., of counsel for the herein above named defendant, and on Thursday, October 1, 1908, by Paul Goepel, Esq., Frank Vincent Du Mond, and Will H. Low, as witnesses for the said complainant, and on Friday, October 2, 1908, by the said Will H. Low (whose testimony was resumed and completed on this last named day), Milton R. Wood, and George F. Muendel, further witnesses for said complainant, and on Friday, October 16, 1908, by Charles W. Frazer, Henry P. Bailey, Charles Petre, Jr., Christopher F. Raichlen, and Charles B. Baldwin, further witnesses for said complainant, and on Friday, October 23, 1908, by Ruben Nixon Howell, Bernard Meyer, and Henry B. Janes, further witnesses for said complainant, and on Thursday, October 29, 1908, by Henry J. Eackiner, Alfred Dejonge, and Henry A. Herbert, further witnesses for said complainant, and on Monday, November 2, 1908, by Charles I. McLaughlin, William L. Drummond, Fred C. Brion, Henry B. Janes (recalled) and Henry J. Sulzbier, further witnesses for said complainant and each of the said witnesses, who were all of sound mind and lawful age, having been by me first carefully cautioned and sworn to testify the truth, the whole truth,
114 and nothing but the truth in the herein above entitled cause, respectively gave their testimony, which, by consent of counsel for the respective parties, was taken down by me in typewriting in the presence of said counsel and of the said witnesses respectively and from the statements of the said witnesses, the signature of each of the said witnesses, with the exception of Paul Goepel, Esq., being waived by consent of the respective counsel, and Mr. Paul Goepel having personally signed his deposition for the reason that it was short and it was convenient for him to sign the same.

And I do further certify that I am not of counsel nor attorneys for either of the parties to the herein above entitled cause nor in any way interested in the event thereof.

In Testimony Whereof, I have hereunto set my hand this six- day of November, 1908.

FANNIE FISK,
Special Examiner by Consent.

115 United States Circuit Court, Eastern District of Pennsylvania, October Sessions, 1906.

No. 1. In Equity.

LOUIS DEJONGE & COMPANY
vs.
BREUKER AND KESSLER COMPANY.

WASHINGTON, D. C., *Friday, July* 9, 1909—11:45 a. m.

Counsel for the respective parties met in Washington by agreement this 9th day of July, 1909, at 11:45 a. m.

Present:

S. D. Cozzens, Esq., for complainant.
Frank S. Busser, Esq., for defendant.

Counsel for complainant offered in evidence fifteen (15) copies of certain copyrights for painting as follows:

Copyright certificate to Lowney, Cl. I-16207, December 1, 1905, "Poinsetta" to Leclercq Cl. I-23547, November 4, 1907, "Sweet Peas" to Leclercq, Cl. I-23548, November 4, 1907, "Pansy Design" to American Lithograph, Cl. I-22179, June 15, 1907, "Per-
116 sian Design" (box top), to Leclercq, Cl. I-26984, September 23, 1908, "Holly Design," to Leclercq Cl. I-26984, September 23, 1908, "Daisy Design," to Leclercq, Cl. I-26986, September 23, 1908, "Holly & Poinsettia," to Lowney, Cl. I-14655, June 2, 1905, "Orchid," to Lowney Cl. I-13353, January 24, 1905, "Daisy" to Lowney, Cl. I-14914, July 10, 1905, "Holly," to Leclercq, Cl. 20382, December 31, 1906, "Holly Berries and Leaves," to Lowney, Cl. I-23170, September 26, 1907, "Morning Glories," to Lowney Cl. I-15333, August 24, 1905, "Morning Glory," to Lowney Cl. 15334 (1), August 24, 1905, "Poppy," to Leclercq, Cl. I-20108, November 30, 1906, "Violet Design."

Counsel for defendant stipulates that each of the said copies is sufficiently certified by the copyright office, but objects to their offer in evidence as irrelevant, incompetent and immaterial, for the reason that there is no presumption of validity of any of said copyrights, as the Register of Copyrights is without discretion to refuse registration of any subject-matter, whether copyrightable or not, provided there is a strict compliance of the registrant with the statute and no admission by the applicant of the uncopyrightable character of the said subject-matter; also for the reason that there is no evidence establishing the character of the subject-matter of the several copyrights.

Session adjourned to New York at a future date to be agreed upon mutually convenient to the counsel.

117 & 118

OFFICE OF GOEPEL & GOEPEL,
290 BROADWAY, NEW YORK CITY,
MONDAY, *April* 18, 1910—11:00 a. m.

Counsel for the respective parties met this 18th day of April, 1910, at 11:00 a. m. pursuant to agreement.

Present:

C. P. Goepel, Esq., and S. D. Cozzens, Esq., for complainant.
Frank S. Busser, Esq., for defendant.

Counsel for complainant offered in evidence the following certified copies of certain copyrights for paintings issued to complainant at the respective dates shown therein:

Class I, XXc, 15,571, dated Sept. 23, 1905, Class I, XXc, 15,571, dated Sept. 23, 1905, Class I, XXc, 23,420, dated Oct. 17, 1907, Class G, XXc, 30,595 dated Aug. 28, 1909, Class G, XXc, 30,596 dated Aug. 28, 1909.

Counsel for defendant objects to said copies as irrelevant, incompetent and immaterial, for reasons stated in the objection to the fifteen copies offered in evidence by complainant July 9, 1909, and additionally objects to the copies of copyrights entered under the law effective July 1, 1909, for the reason that many copyrights might be valid under the existing law that would be invalid if their registration were attempted under the law in force at the date of registration of complainant's alleged copyright, and therefore even if there were any presumption of validity of the copyrights entered under the existing law, such presumption would not apply to complainant's copyright in suit.

Complainant's rebuttal case closed.

119 In the Circuit Court of the United States, Eastern District of Pennsylvania.

In Equity.

LOUIS DEJONGE & COMPANY
vs.
BREUKER & KESSLER COMPANY.

The Answer of Breuker & Kessler Company to the Bill of Complaint of Louis Dejonge & Company.

This respondent, now and at all times hereafter saving and reserving unto itself all and all manner of benefit and advantage of exception which may be had or taken to the manifold errors, uncertainties, imperfections and insufficiencies of the Bill of Complaint, for answer thereto, or to so much thereof as it is advised it is material or necessary to make answer to, answering, says:

First. This respondent is not informed, save by said Bill of Complaint, that complainant is a corporation created and organized

under the laws of the State of New York and denies the same, leaving the complainant to make proof thereof.

Second. This respondent is not informed, save by said bill, that complainant was, prior to September 23, 1905, or at any time, proprietor of the alleged painting set forth in said bill; or that said alleged painting was the production of a citizen of the United States; or that defendant, before the day of publication of said alleged painting, duly deposited, on September 23, 1905, or at any time in the office of the Librarian of Congress, a description of
120 said alleged painting, or delivered, on said date or at any time, at said office, a photograph of said alleged painting; or that on said date, or at any time, the Librarian of Congress duly recorded the description of said alleged painting in the words of "Exhibit A" or otherwise; or that the complainant, on said date, or at any time, paid to the Librarian of Congress the sum of fifty cents for recording the title or description of said alleged painting; or that complainant, on said date, or at any time, paid to the Librarian of Congress the sum of fifty cents for an additional copy under seal of said alleged record; or that complainant, on said date, or at any time, actually received said alleged copy record; and therefore denies the same and leaves complainant to its proof thereof.

Third. This respondent is not informed, save by said bill, that said alleged painting was conceived and produced by George F. Muendel; or that said Muendel is an artist or was born in the United States, or was, at the date named in said bill or at any time, resident within the United States; or that said Muendel, on May 5, 1905, or at any time, assigned to complainant his alleged interest in said alleged painting and in his alleged right to copyright the same; and therefore denies the same and leaves complainant to its proof thereof.

Fourth. This respondent denies that the complainant, as alleged in said bill, is entitled to a copyright in said alleged painting; denies that complainant is vested, for the term of twenty-eight years from September 23, 1905, or for any term, with the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, or vending the said alleged painting, and denies that complainant has been or now is the sole owner or proprietor of said alleged copyright or of the alleged rights thereunder.

121 Fifth. This respondent denies that complainant has given due notice of its alleged copyright; and denies that complainant has inscribed upon a visible portion of each one of the several copies of every edition published by it the words "Copyright, 1905, by Louis Dejonge & Company," or any other words of equivalent import.

Sixth. This respondent denies that, subsequent to September 23, 1905, and prior to the filing of said bill, or at any time, it did, at the City of Philadelphia in the State and Eastern District of Pennsylvania, or elsewhere, engrave, etch, work, copy, print or publish, said alleged painting either in whole or in part, or by varying the main design, or sell or expose to sale any copies of the same.

Seventh. This respondent denies that it has been warned to desist from the alleged infringement of said alleged copyright; denies that

it has been warned of complainant's alleged exclusive rights, denies that it has commenced, or is continuing, or threatens or intends to commence or continue to print or publish or sell or expose to sale copies of said alleged paintings; and denies that the complainant is suffering or will suffer great, irreparable, or any, loss, damage, or injury, from any acts of the respondent.

Eighth. This respondent denies that any acts of the respondent have had or will have the effect of inducing or encouraging other persons to infringe said alleged copyright or to violate the alleged exclusive rights of complainant.

Ninth. This respondent denies that it has received large or any gains or profits from any alleged infringement of complainant's alleged copyright.

Tenth. This respondent is not informed, save by said bill, that complainant, has expended large or any sums of money in
122 preparing to print copies of said alleged painting or in publishing the same; or that it has bestowed much or any time or effort in making said copies known to the trade and the public generally; or that the trade or any portion of the public have come to identify said copies as the productions of complainant; and therefore denies the same and leaves the complainant to its proof thereof.

Eleventh. This respondent is not informed, save by said bill, that said "Exhibit B" is a copy of its alleged reproductions of said alleged painting, and therefore denies the same, leaving complainant to its proof thereof.

Twelfth. This respondent admits that "Exhibit C" is a portion of a sheet of box paper produced by it, but denies that, in producing the same, it has adopted the general conception of said alleged artist; and denies that it has employed, reproduced, or imitated, the holly berries, mistletoe, leaves, sprigs, clusters, colors, or general outline, of said alleged painting.

Thirteenth. This respondent denies that the trade or purchasers have been induced, by any acts of the respondent or otherwise, to believe that respondent is the proprietor of the right to print or publish copies of said alleged painting, or to give orders to respondent instead of to complainant.

Fourteenth. This respondent, further answering, avers that said alleged painting is not a painting in the sense of the copyright law, but is a design for an article of manufacture and was produced especially for paper for covering boxes and as such is not within the purview of the Acts of Congress relating to copyrights; that the alleged deposit of a description and photograph of the same as a paint-
ing in the office of the Librarian of Congress, and the pay-
123 ment of the legal fee prescribed by law for the entry of a painting for copyright, as alleged in the bill, gave to complainant no exclusive rights under the copyright law to said alleged painting and did not vest in complainant the exclusive liberty of printing, publishing, completing, copying, executing, finishing or vending said alleged painting or copies thereof; that even if said alleged painting were copyrightable, it was not copyrightable as a

painting, and that complainant's alleged copyright is therefore void and of no force and effect.

Fifteenth. This respondent, further answering, avers that said alleged painting, being as aforesaid, a design for an article of manufacture, is capable of being protected only under the Acts of Congress relating to patents for new, original and ornamental designs for articles of manufacture, and that complainant's alleged copyright is therefore void and of no force and effect.

Sixteenth. This respondent, further answering, avers that the design for the box paper like Exhibit C made and sold by defendant and complained of by complainant was patented October 9, 1906, as a design for box paper, said design patent being numbered 38281 and issued to the defendant.

Seventeenth. This respondent, further answering, avers that complainant has sold large numbers of copies of said alleged painting without inscribing upon some visible portion thereof, or of the substance on which the same was mounted, any words indicating that the same was copyrighted or entered according to Act of Congress in the office of the Librarian of Congress at Washington, as required by Section 4962 of the Act of Congress; and the complainant is therefore without right to maintain an action for infringement of said alleged copyright.

124 Eighteenth. This respondent, answering the specific interrogatories contained in complainant's bill of complaint, states as follows:

To the first interrogatory, no.

To the second interrogatory, no.

To the third interrogatory, no.

To the fourth interrogatory, respondent denies that it has ever published or sold or exposed to sale copies of said alleged painting, but admits that since the 23d day of September, 1905, and prior to the filing of the bill of complaint herein, it has applied a design the same as "Exhibit C" to box paper and has sold and exposed to sale such box paper.

Eighteenth. This respondent, further answering, denies that the complainant herein, by reason of any matter or thing set forth in said bill of complaint, and not herein explicitly denied, has any right or equity to have the relief and discovery prayed for in said bill of complaint, or any part thereof, against this respondent; without this that there is any other matter or thing in said bill of complaint contained, material or necessary to make answer unto, and not herein and hereby well, fully and sufficiently answered, traversed, avoided or denied, is true to the knowledge or belief of this respondent, all of which matters and things this respondent is ready and willing to aver, maintain and prove as this Honorable Court shall direct and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) BREUKER & KESSLER CO.,
Per HARRY C. KESSLER, JR.,
Treasurer.

(Signed) HARDING & HARDING,
Solicitors for Respondent.

125 STATE OF PENNSYLVANIA.
County of Philadelphia, ss:

On this 5th day of November, A. D. 1906, before me came Harry C. Kessler, Jr., and being by me duly sworn, did depose and say that he is the treasurer of the respondent corporation; that he has read the foregoing answer, and that the same is true to the best of his knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he verily believes them to be true.

(Signed) HARRY C. KESSLER, JR.

Subscribed and sworn to before me this 5th day of November, A. D. 1906.

(Signed) M. M. HAMILTON,
[SEAL.] *Notary Public.*

Commission expires February 2, 1910.

126 Circuit Court of the United States, Eastern District of Pennsylvania.

In Equity.

LOUIS DEJONGE AND COMPANY
v.
BREUKER AND KESSLER COMPANY.

Proofs for Final Hearing Taken on the Part of the Above-named Defendant, Pursuant to Notice, at the Office of Harding and Harding, 927 Land Title Building, Philadelphia, Pennsylvania, Before M. M. Hamilton, a Notary Public, Acting as Special Examiner by Consent, on Thursday, March 25, 1909, at 11 O'clock a. m.

PHILADELPHIA, *March* 25, 1909.

Present:

S. D. Cozzens, Esq., of Counsel with Goepel and Goepel for Complainant.

Frank S. Busser, Esq., for Defendant.

GEORGE A. SOOK, a witness on behalf of defendant, being duly sworn, deposes and says, in answer to questions asked by Mr. Busser, as follows:

Q. 1. What is your name, age, residence and occupation?

A. George A. Sook; age, 50 years; residence, 2407 Oxford street, Philadelphia; occupation, designer.

Q. 2. Please specify briefly the class of articles for which you make designs?

A. General commercial designing.

Q. 3. I show you two exhibits, one marked "Complainant's Ex-

hibit Copyrighted Painting" and the other marked "Exhibit Defendant's Product." Referring, for the present, only to "Exhibit Defendant's Product," what would be the name applied in
127 the trade or profession to the original from which the lithographed sheet was prepared?

(Complainant's counsel objects to this question as immaterial and irrelevant, and further that it does not yet appear that the witness has any knowledge of what the trade name would be.)

A. A design.

Q. 4. Referring now to "Complainant's Exhibit Copyrighted Painting," can you form any opinion, from inspection alone, what the same is?

A. That is also a design.

Q. 5. Can you form any opinion as to what kind of a design it is; that is what it is probably intended for?

(Question objected to for the reason that it can make no difference what may be the purpose for which the exhibit was intended.)

A. To my mind it is intended for a box paper or possibly a wrapper. Some firms putting out holiday goods put an extra wrapper to make it look nice and tying with a ribbon, employing paper for that purpose.

Q. 6. Have you ever yourself made designs for box papers or wrappers?

A. Yes, sir.

Q. 7. In your opinion, would the trade or profession, or you yourself, call the "design" that has been submitted to you, a "painting"?

(Objected to as immaterial and irrelevant, since it can make no difference in this case by what name the trade or profession to which the question refers would call the exhibit.)

A. No.

Q. 8. After the design is transposed to or fixed upon the lithographic stone—and I am speaking of designs of the character of the one submitted to you—(Complainant's Exhibit Copyrighted
128 Painting)—of what intrinsic value, if any, is the original design, and what disposition is usually made of it?

(Objected to as immaterial and irrelevant, since it is a mere matter of individual opinion, as to the value of such a work and a matter of differing custom as to what disposition would be made of the painting inquired about.)

A. No particular value, and the general rule is to file them away for reference, or destroy them.

Q. 9. Do you know of any instances where the original design, of the character of the one submitted, was sold for a valuable consideration after reproduction of the same on box paper?

A. No.

Q. 10. I will now ask you to compare the two exhibits heretofore handed you, namely, "Complainant's Exhibit Copyrighted Paint-

ing" and "Exhibit Defendant's Product," and ask you to state whether, in your opinion the two designs shown you are substantially the same, or substantialy different?

A. The only similarity I detect is that both products employ holly, mistletoe and pine, otherwise the designs differ materially.

Q. 11. Are you of the opinion that if you had first seen one of these designs and paid some attention to it, and had afterwards seen the other, that you would mistake it for the first?

(Question objected to as incompetent and immaterial.)

A. No.

Q. 12. How many years' experience have you had as a designer?

A. Twenty-five.

(Direct examination closed.)

129 Cross-examination.

By Mr. Cozzens:

X Q. 13. You say in your tenth answer: "Otherwise the designs differ materially." Please sate all of the differences which you think exist between the two designs; kindly mention them all?

(Objected to as irrelevant and immaterial.)

A. In the first place the masses are not so dense in the defendant's "product" as in the "copyrighted painting." Secondly, the copyrighted painting employs more mistletoe. The defendant's "product" is intertwined much more by branches of pine, upon which are numerous pine cones, which are not to be found in the "copyrighted painting."

X Q. 14. Are those all the differences you find?

A. All specific differences, but the general impression produced by the two is different in the wo.

(Deposition closed; signature waived.)

William Gosewisch, a witness called on behalf of defendant, being duly sworn, deposes and says, in answer to questions asked by Mr. Busser, as follows:

Q. 1. What is your name, age, residence and occupation.

A. William Gosewisch; age 36 years; residence, Fifty-eighth near Woodbine avenue, Philadelphia; occupation, artist and designer.

Q. 2. For what class of articles do you make designs?

A. I made designs for lithographers, for various branches, such as box tops, tablet covers and show cards, in fact every branch of the lithographic trade.

Q. 3. I hand you an exhibit marked "Complainant's Exhibit Copyrighted Painting" what would be the name applied, in
130 the trade or profession, to that work, if you can tell by inspection?

(Complainant's counsel objects to the question as immaterial and irrelevant, as it is of no consequence what name is applied by the trade or profession referred to.)

A. That is a design, the only thing I can call it.

Q. 4. Can you form an opinion from inspection as to what kind of a design it is; that is, what it is probably intended for?

(Objected to as immaterial and irrelevant, since the purpose for which the work was intended is of no consequence.)

A. Used for box tops.

Q. 5. In your opinion, would the trade or profession or you yourself call the design that has been submitted to you a "painting"?

(Objected to as immaterial and irrelevant, since it would make no difference in this case by what name the witness or the trade, or profession in question would call the exhibit.)

A. No.

Q. 6. In your experience, state whether you have ever known designs of the character of the one submitted to you to be framed in the ordinary course of business?

(Objected to as irrelevant and immaterial.)

A. No.

Q. 7. After a design for box paper, or the like, of the character of the one submitted to you, is applied to the lithographic stone, of what intrinsic value, if any, is the original design?

(Objected to as immaterial and irrelevant, as it is a mere matter of individual opinion as to the value of such work.)

A. Of none at all.

Q. 8. What disposition is usually made of the original
131 design, if you know, after the lithographer is through with it?

(Objected to as immaterial and irrelevant, since it can make no difference what disposition would be made of it and the disposition is a matter of differing custom; and further it does not yet appear that the witness has any knowledge on the subject inquired about.)

A. Well, usually some people file them for reference, others destroy them. That is about all I can say.

Q. 9. How do you know this?

(Same objection.)

A. By experience.

Q. 10. Please specify the nature of the experience by which you are able to testify as to the ultimate disposition of these designs?

A. I worked for George S. Harrison Sons and afterwards the American Lithograph Co. several years, and several others.

Q. 11. How many years have you been an artist and designer?

A. Twenty years at least.

Q. 12. Do you know of any instances where the original design, of the character of the one submitted to you, has been sold for a valuable consideration after the lithographer was through with it?

A. No, never.

Q. 13. Please compare the exhibit handed you, namely, "Complainant's Exhibit Copyrighted Painting," with the sheet of box paper marked "Exhibit Defendant's Product," and state whether in your opinion the two designs shown you are substantially the same, or substantially different?

A. I consider them entirely different.

Q. 14. In general effect, or in detail?

A. Both; especially in detail they are different.

Q. 15. In what respect, if any, are they similar?

132 A. The only similarity I see is that they are both holly and mistletoe designs. That is the only similarity I can see.

(Direct examination closed.)

Cross-examination.

By Mr. COZZENS:

X Q. 16. You have said you consider these two exhibits entirely different; please state in detail what the differences between them are?

A. The difference is the leaves are not placed alike, the red holly berries are not in the same places, besides the mistletoe is not the same, is not placed the same either, besides there being an addition of pine cones, besides there being a decided difference in the pine needles, a very decided difference, in color as well as style.

X Q. 17. Any other differences?

A. No, that is the only difference I can see.

(Deposition closed; signature waived.)

C. HORACE BOWMAN, a witness called on behalf of defendant, being duly sworn, deposes and says, as follows, in answer to questions asked by Mr. Busser:

Q. 1. What is your name, age, residence and occupation?

A. C. Horace Bowman; age, twenty-two years; occupation, designer and artist; residence, 1324 North Redfield street, Philadelphia.

Q. 2. Please specify briefly the class of articles for which you make designs?

A. Fancy papers, box tops, calendar borders, etc., general commercial work.

Q. 3. For how many years have you been a designer and

133 artist?

A. Seven and a half.

Q. 4. Have you ever been employed as a designer by any lithographer, and if so, by whom?

A. Yes; by the Ketterlinus Lithograph Company. I might add that I was manager of the Bacon Art Company's art department, but they are not strictly lithographers.

Q. 5. I hand you an exhibit marked "Complainant's Exhibit Copyrighted Painting." Can you tell by inspection what would be the name applied in the trade or profession to that work?

(Objected to as immaterial and irrelevant, because the name given the article by the trade or profession is of no consequence.)

A. Yes; it is a holly paper design.

Q. 6. Could you form any judgment by inspection to what the design was probably intended to be applied?

(Objected to as immaterial and irrelevant, as the object to which the work was probably intended to be applied is of no consequence.)

A. A wrapper and a paper which is used to go around fancy boxes.

Q. 7. In your opinion, would lithographers or artists, or commercial designers, or you yourself, call the design that has been submitted to you a painting?

(Objected to as immaterial and irrelevant for the reason that the question is not what the exhibit would be called by the trade or profession referred to or by the witness, but what it really is, or what the Court may hold that it is.)

A. No.

Q. 8. After a design for box paper or the like, of the character of the one submitted to you, is applied to the lithographic
134 stone, of what intrinsic value, if any, is the original design?

(Objected to as immaterial and irrelevant.)

A. None, except to compare with the reproduction.

Q. 9. Have you any knowledge of how the stone artists, as I believe they are called, in lithographic work transfer the design to the stone?

(Objected to as immaterial and irrelevant.)

A. Yes.

Q. 10. Can you state whether any special care is taken with the original, as far as maintaining it intact is concerned?

(Same objection, and further because what the question inquires about is a matter of differing customs with different firms.)

A. It is very seldom that any care is taken whatever. Especially when the reproduction is limited in time, they resort to cutting the sketch in two or more parts, which enables them to have different stones artists work on it at the same time.

(The last clause of the answer is objected to as immaterial and irrelevant, because the matter stated by the witness is a differing custom among different firms.)

Q. 11. What do you mean by "sketch," as used in your last answer?

A. I mean a design.

Q. 12. From your experience can you state what disposition is usually made of the original design when the lithographer is finished reproducing the same?

(Objected to as immaterial and irrelevant, and for the reasons stated in objecting to similar question to the other witnesses.)

A. They are sometimes saved for reference, but are usually destroyed.

Q. 13. Can you state what was done with the original designs by the Ketterlinus Lithograph Company when you were with them?

(Objected to as immaterial and irrelevant, and also because
135 it does not appear what particular designs are intended to be referred to.)

(Counsel for defendant instructs the witness that he refers to designs for box paper and designs of a similar character.)

(The first part of the objection continues.)

A. Designs of this nature made by Ketterlinus Co. are made for special customers, and when these customers do not ask to have the design given to them, they are destroyed.

Q. 14. Please compare the exhibit handed you, namely, "Complainant's Exhibit Copyrighted Painting," with the sheet of box paper marked "Exhibit Defendant's Product," and state whether, in your opinion, the two designs shown you are substantially the same, or substantially different?

A. Substantially different.

Q. 15. In general effect or in detail?

A. Both.

(Direct examination closed.)

Cross-examination.

By Mr. COZZENS:

X Q. 16. Have there been cases in which the customers of the Ketterlinus Co. requested that what you have called the designs made for them specially to be given to them?

A. Yes.

X Q. 17. Please state in detail all the differences which you find between the "Exhibit Copyrighted Painting" and "Exhibit Defendant's Product".

A. The "Copyrighted Painting" has two large masses and one small one, and the "Defendant's Product" has three large masses and one small one. The mistletoe on the "Copyrighted Painting"
is kept more separate from the holly than in the "Defend-
136 ant's Product". The spruce in the "Copyrighted Painting"
is worked as a connecting link between the masses, whereas the pine on the "Defendant's Product" branches out from each mass. All of these change the general effect. As for detail, no two leaves are at all alike in the two exhibits, the red holly berries are different in design and different in shade of color. The mistletoe berries are different in design and different in color. The spruce on the "Copyrighted Painting" has a thick, short needle and has no cone, while the pine on the "Defendant's Product" has thin, long needles and has cones. The color of the spruce on the "Copyrighted

Painting" is a blue green, while that on the "Defendant's Product" is a yellow green. The stems of the pine are also differently colored.

X Q. 18. Any other differences?

A. I think that is all.

(Deposition closed; signature waived.)

(Recess until 2:30 p. m.)

After Recess.

HARRY S. C. BACON, a witness, being duly sworn, deposes and says, in answer to questions asked as follows:

By Mr. BUSSER:

Q. 1. What is your name, age, residence and occupation?

A. Harry S. C. Bacon; age, 28 years; residence "The Netherlands," Forty-third and Chestnut streets, Philadelphia; occupation, I am a salesman and also member of the firm of Gilbert & Bacon and Bacon Art Company.

Q. 2. Is the Bacon Art Company still actively engaged in business?

A. Yes.

137 Q. 3. What is, or was, the nature of your duties in connection with the Bacon Art Company?

A. The two were worked in connection, the Bacon Art Company and Gilbert & Bacon. My duty was salesman of designs and manager of the business.

Q. 4. I hand you "Complainant's Exhibit Copyrighted Painting," and ask you to state whether by inspection of the same you can form any judgment as to what that work actually is?

A. Why, I would say that it was meant for a lithographic work.

Q. 5. Will you please compare what I have handed you with the sheet of box paper marked "Exhibit Defendant's Product," and state whether or not, in your opinion, the two designs, respectively shown therein, are substantially the same or substantially different?

A. I would not hesitate to say that they are substantially different, inasmuch as they are both supposed to represent holly and mistletoe; I can't see any similarity of design.

(Direct examination closed.)

Cross-examination.

By Mr. COZZENS:

X Q. 6. Please mention the differences you find between the two exhibits.

(Objected to as immaterial and irrelevant.)

A. Why, in the first place, I take this ("Copyright painting") to be a repeat, in which I can see two clusters, while in the other

("Defendant's Product"), I see three distinct clusters. While in the former, they use the spruce design, the other uses pine and pine cone, which has a general tendency to make a fuller design and not so much blank space, and the former they have very distinct edgings, the edge of the leaf, while in the latter the edgings are not
138 so distinct, and the shading is different.

X Q. 7. Any other differences?

A. I could go into a great deal of detail, but they would be the most noticeable differences.

(Deposition closed, signature waived.)

JOHN M. SCHEER, a witness called on behalf of defendant, being duly sworn, deposes and says, as follows, in answer to question asked.

By Mr. BUSSER:

Q. 1. What is your name, age, residence and occupation?

A. John M. Scheer; age 48 years; residence, Wayne, Delaware County, Pa.; occupation, lithographic artist.

Q. 2. With whom are you now employed?

A. Breuker and Kessler.

Q. 3. The defendant in this case?

A. Yes.

Q. 4. How long have you been employed by the defendant?

A. Going on about four years.

Q. 5. Have you previously been employed by other lithographers and if so, by whom?

A. Ketterlinus Lithographic Co., Fourth and Arch; Harrison Sons, Sinclairs, and others.

Q. 6. Do you recognize the work I now hand you, and if so state what is it?

A. That is a design for box paper.

Q. 7. An original design?

A. Yes, sir.

Q. 8. Is this ("Exhibit Defendant's Product") the box paper embodying the original design I handed you?
139 A. Yes, sir; a reproduction of it.

(The design handed the witness is offered in evidence and the Examiner is requested to mark the same with the title of the case, and "Defendant's Exhibit Defendant's Design.")

Q. 9. State what is the custom with the defendant, as well as with other lithographers by whom you have been employed, with respect to the disposition of original designs after the lithographer has finished reproducing the same?

(Objected to as immaterial and irrelevant for the same reasons as stated to similar questions to the other witnesses.)

A. Why, we merely throw them away; they are of no value whatever.

Q. 10. I hand you "Complainant's Exhibit Copyright Painting,"

and ask you to state whether you can tell from an inspection of the same what it is?

A. That is a design made to repeat.

Q. 11. Could you form any judgment from the mere inspection of the same to what the design was probably intended to be applied?

(Objected to as irrelevant and immaterial, the purpose to which the exhibit may have been intended to be applied being of no consequence.)

A. From my experience in the business, I would say it was a box paper design.

(Adjourned until Thursday, March 26th, 1909, at eleven o'clock.)

PHILADELPHIA, *March 26th*, 1909.

Met pursuant to adjournment.

Present: Counsel as before.

Examination of Witness SCHERR continued:

Q. 12. For the information of the Court, will you please describe the process of lithography, as ordinarily carried out, starting with the original design?

(Objected to as immaterial and irrelevant.)

A. Well, the design is traced on gelatine and according to the number of colors required to reproduce the sketch, offsets on the number of stones that is required. The stone artist, of course, takes up each stone and fills in each color where it is required to make a finished reproduction of the sketch. Assuming that we are dealing with, for example, a box paper design, these are the original stones, they take impressions from the original and transfer them to a large stone for the printing process.

Q. 13. Have you ever lithographed what you consider as paintings?

A. Yes, sir.

Q. 14. You state in answer to Q.'s 10 and 11 that you can tell from an inspection of "Complainant's Exhibit Copyrighted Painting" that the same is a box paper design made to repeat. How are you able to distinguish from mere inspection between a design for box paper made to repeat and a painting?

(Objected to as immaterial and irrelevant.)

A. Well, a box paper is made by the artist, well his main effort is to make a sketch that will look well in repeat and finishes the edges of a design as well as other parts, so in repeating it will form a design as a whole, and its value is in the repeat forming a picture. Well, in regard to a painting, the picture is finished without regard to repeats and it is something beautiful in itself. The main work is to finish the point that tells the story and all the surroundings and edges are finished to help the central story out, without regard to repeat.

Q. 15. In your experience in the reproduction of paintings by lithography, are the paintings considered of value in and of them-

selves after they are reproduced, or are they thrown away like
141 box paper designs?

(Objected to as leading and also as immaterial, irrelevant, and as relating to a matter of which it is obvious the witness would have no knowledge, except, perhaps, in special cases.)

A. They are considered to have value.

Q. 16. In your experience, when a lithographer wishes to hurry the work of reproducing a design, is or is not special care taken to maintain the original design intact?

(Objected to as immaterial and irrelevant.)

A. Very often it is cut up into pieces to finish the work more rapidly, so three or four men may work on the same design.

(Direct examination closed.)

(Deposition closed; signature waived.)

WALTER P. MILLER, a witness called on behalf of defendant, being duly sworn, deposes and says, in answer to questions asked by Mr. Busser, as follows:

Q. 1. What is your name, age, residence and occupation?

A. Walter P. Miller; age, 42 years; residence, 521 Mt. Airy avenue, Mt. Airy, Philadelphia; occupation, manufacturer of paper boxes.

Q. 2. Where is your place of business?

A. 452 York avenue, Philadelphia.

Q. 3. How long have you been in the paper box business?

A. About 22 years. I have been 12 years for myself and 10 years with another concern.

Q. 4. In your business do you have occasion to purchase fancy paper for covering boxes?

A. Yes.

142 Q. 5. Will you please examine the two exhibits that are before you, one in a frame, marked "Complainant's Exhibit Copyrighted Painting" and the other a sheet of box paper marked "Exhibit Defendant's Product," and state whether, in your opinion, the two designs respectively embodied in the two exhibits are substantially the same or substantially different?

A. No, I should say that they are very different.

Q. 6. Would you be able to handle both of these designs as applied to box paper in your business, or do you think you could handle only one of them?

A. I think I could handle both of them.

Q. 7. Do you think either one would be preferred to the other by any particular class of customers?

A. Yes, I think that the beautiful way that this mistletoe is brought out in the "Exhibit Copyrighted Painting" would appeal to a certain class, that the other, the "Defendant's Product," wouldn't. For instance, referring to "Copyrighted Painting," made up into a candy box, it would have a sentimental value to the young lady who might receive it. In the other exhibit I should think that it would

be more attractive by reason of the brightness of the berry, and would, for instance, be very suitable for department store work. There is one other thing that strikes me in the "Exhibit Defendant's Product," and that is the background is better filled and makes a closer design, particularly for the class of work mentioned above. To make my view of the matter a little clearer, I would say that I can just picture the beautiful mistletoe design of this "Exhibit Copyrighted Painting" on the top of a candy box, and how well it would make up for that purpose. In the other exhibit, I can see the paper used on, say, a handkerchief box that requires a close pattern and bright and snappy, which seems to be the attractiveness as brought out by the bunching of the red berries. I say that in explana-
143 tion of what I said previously.

(Direct examination closed.)
(No cross-examination.)
(Deposition closed; signature waived.)

HARRY C. KESSLER, JR., a witness called on behalf of defendant, being duly sworn, deposes and says, in answer to questions asked by Mr. Busser, as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Harry C. Kessler; age, 26 years; residence, Warrington, Bucks Co., Pa.; occupation, lithographer.

Q. 2. Are you connected with the defendant company and if so, in what capacity?

A. As secretary and treasurer.

(Recess until 2 P. M.)

After recess.

Q. 3. Will you please state whether, on behalf of the defendant company, you ever attempted to copyright box paper, or design therefor, and if so, please state what experience you had in that connection?

A. I made three attempts to copyright fancy papers in 1905 and 1906. The first letter to the Register of Copyrights follows:

"11/25/05.

Mr. Thorvald Solberg, Register of Copyrights, Washington, D. C.

"DEAR SIR: Will you please send us the proper blank forms to be used in copyrighting a fancy box paper, and oblige,

Yours truly,

BREUCKER AND KESSLER COMPANY."

144 To this letter I received a reply under date of November 28th, 1905, as follows:

"LIBRARY OF CONGRESS,
COPYRIGHT OFFICE,
WASHINGTON, D. C., *November* 28, 1905.

In reply quote file No. 190981. F. W. A.-W. S. H.

"GENTLEMEN: I beg to state in response to your letter of November 25th, that a 'fancy paper-box' would not be subject to protection

through registration in this office. See circular 27. Possibly the desired protection could be secured through some action on the part of the Patent Office. See circular 11 and 24. For any more definite information you should address the Commissioner of Patents.

Respectfully,

THORVALD SOLBERG,
Register of Copyrights.

Inclosures: Cir. 11, 24, 27.

The Breuker & Kessler Company, N. W. Cor. 7th & Arch Streets, Philadelphia, Pa."

Under date of December 1st, 1905, I wrote to the Register of Copyrights as follows:

"12/1/05.

Mr. Thorvald Solberg, Register of Copyrights, Washington, D. C.

"DEAR SIR: Will you please send us the proper blank form to be used for registering a Wall Paper design, and oblige,

Yours truly,

H. C. K. Jr." BREUKER & KESSLER COMPANY.

145 In reply to this letter, I received, under date of December 7th, 1905, the following letter:

"LIBRARY OF CONGRESS,
COPYRIGHT OFFICE,
WASHINGTON, D. C., *December* 7, 1905.

In reply quote file No. 191281, J. E. B.

GENTLEMEN: I have the honor, by request of the Librarian of Congress, to acknowledge the receipt of your letter of December 1, 1905.

In reply, I beg to state that a design or an article of manufacture such as 'wall paper' would not be subject to registration in this office. See circular 27.

Section 4929 of the Revised Statutes provides that whoever invents a new ornamental design for an article of manufacture may obtain a patent therefor. For any information respecting patents you should address the Commissioner of Patents. See circular 23.

Respectfully,

THORVALD SOLBERG,
Register of Copyrights.

Inc. Cir. 23 & 27.

The Breuker & Kessler Company, N. W. Cor. 7th & Arch Streets, Philadelphia, Pa."

Later I made another attempt to copyright a fancy paper; the design in this case was holly and mistletoe of the same general character as "Complainant's Copyrighted Painting." I made application, on one of the regular forms, for protection as a lithograph. In reply to my application, I received the following letter from the Register of Copyrights:

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146 "LIBRARY OF CONGRESS,
COPYRIGHT OFFICE.
WASHINGTON, D. C., *May* 8, 1906.

In reply quote file No. 200514. A. W. W.

DEAR SIRS: I have the honor, by request of the Librarian of Congress, to acknowledge the receipt of your application for entry of a lithograph entitled "Holly and Mistletoe." The copies of your work received at this office appear to be in the nature of patterns for wall paper, or box covering.

The statutes provides that the only lithographs subject to entry in this office are pictorial illustrations, such as the illustrations of a book, and works of the fine arts, such as would be prized for their artistic value alone. Your work would hardly appear to be embraced by the term as used in the statute.

Entry as applied for not appearing permissible, your remittance of 50 cents is herewith returned in the original money order.

Inc. M. O. 50 cents.

Respectfully,

THORVALD SOLBERG,
Register of Copyrights.

Brenker & Kessler Company, N. W. Co. 7th & Arch Streets, Philadelphia, Penna."

(Complainant's counsel objects to the answer of the witness for the reason that the experience has no connection with anything involved in this case, but it is stipulated, subject to this objection that the witness's testimony with respect to the contents of the said letters, to and from the Register of Copyrights, and the letters themselves, may be used with the same force and effect as if the original letters had been produced, properly proved, and offered in evidence.)

Q. 4. Were either of the designs that you attempted to copyright the design embodied in "Exhibit Defendant's Product?"

A. No.

147 Q. 5. State what steps, if any, you took to protect the design embodied in "Exhibit Defendant's Product?"

(Objected to as immaterial and irrelevant.)

A. I applied to our attorneys, Harding and Harding, and placed the matter in their hands.

Q. 6. And what was done under their advice?

A. The design was patented, no attempt at copyrighting being made.

Q. 7. Can you produce this patent, or a copy thereof?

A. I can and do.

(It is stipulated that the officially printed copy of the patent referred to by the witness may be offered in evidence with the same force and effect as the original or a duly certified copy thereof.)

(Defendant's counsel, therefore, offers the same in evidence, and

requests that it be marked with the title of the case and "Defendant's Exhibit Patent for Defendant's Design.")

(Offer objected to as immaterial and irrelevant.)

Q. 8. State whether you had made, under your supervision, photographs of single repeats of complainant's and defendant's designs, and if so, from what these photographs were made?

(Objected to as incompetent as it appears that the witness himself did not make the photographs.)

A. I cut pieces from the reproduction of complainant's "Copyrighted Painting" and from a duplicate of "Defendant's Product," that is from the two box papers, and had these photographed at the same time, under like conditions, personally superintending the work, but not doing the developing.

Q. 9. Where was this work done?

A. This work was done in our establishment.

(The photographs produced by the witness are offered in evidence and the notary is requested to mark the same with the title of the case, and respectively, "Defendant's Exhibit Photograph of
148 Complainant's Design," and "Defendant's Exhibit Photograph Defendant's Design.")

(Direct examination closed.)

(No cross-examination.)

(Deposition closed; signature waived.)

JACOB C. SCHAUT, a witness called on behalf of defendant, being duly sworn, deposes and says, in answer to question asked by Mr. Busser, as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Jacob C. Shaut; age, 52 years; residence, 2909 Columbia avenue, Philadelphia; occupation, picture dealer and picture framer.

Q. 2. In your business do you sell paintings?

A. Yes.

Q. 3. Do you frame them?

A. Yes.

Q. 4. I hand you an exhibit marked "Copyrighted Painting" and ask you to state whether, in your opinion, that would or would not be termed a "painting" in your business.

A. No, sir.

Q. 5. Would a picture of that kind, framed or unframed, be a salable commodity in your business?

A. No, sir.

Q. 6. How many years have you been engaged in your present business?

A. 37 years, sir.

Q. 7. Please compare the exhibit that I have shown you "Complainant's Exhibit Copyrighted Painting" with the design embodied in the sheet of box paper marked "Exhibit Defendant's Product," and state, whether, in your opinion, the two designs are substantially the same or substantially different?

149 A. First, there is no comparison in the two. One "Copyrighted Painting" being in the nature of a design more like holly laid with an ordinary pine effect. Now in reference to the other ("Defendant's Product") design, it is of different style and character of a holly but intermingled with more of a *balm* leaf, the background being of a plain white nature intermingled with acorns, *which* the other has no style of character of the kind being more open in design and pattern. Therefore, I see no comparison in the two designs as a work of art, the two being diametrically in design different.

Q. 8. Why would you not consider the exhibit marked "Copyrighted Painting" a painting?

A. Simply because, in the first place, it is not a painting, it is simply a print, and is not the original painting.

Q. 9. Assuming that the exhibit submitted to you, marked "Copyrighted Painting," is the original picture from which prints or lithographs could be produced, why, as you state, would the same not be salable?

A. The reason I state that is is unsalable, first, there is only part of the leaves, part of the holly and would consider it an unfinished piece of work.

Q. 10. Could you determine from an inspection of the same for what it was probably intended?

(Objected to as immaterial and irrelevant, and further because it does not appear that the witness has had the special experience to qualify him to testify.)

A. I cannot. I have seen a number of sheets, and have seen them in the factories, and are used for decorating or wrapping purpose, such as wrapping boxes or packages.

(The last clause is objected to as not responsive and volunteered.)

(Direct examination closed.)

150 Cross-examination.

By Mr. COZZENS:

X Q. 11. Have you stated in your seventh answer all the substantial differences which you say you find between the "Exhibit Copyrighted Painting" and "Defendant's Product"?

A. I don't know of anything else, excepting that comparing the two there is no comparison that I can see in the two whatever.

(Cross-examination closed.)

(Deposition closed, signature waived.)

(Adjourned until Friday, April 2nd, 1909, at the office of C. G. Heylmun, 1003 F street, N. W., Washington, D. C., at 2 p. m.)

Circuit Court of the United States, Eastern District of Pennsylvania, October Session, 1906.

In Equity. No. 1.

LOUIS DEJONGE AND COMPANY
v.
BREUKER AND KESSLER COMPANY.

I, M. M. Hamilton, a notary public, in and for the County of Philadelphia, State of Pennsylvania, Eastern District of Pennsylvania, do certify that the within and foregoing depositions were taken before me at the time and place therein stated; that the witnesses therein named, George A. Sook, William Gosewisch, C. Horace Bowman, Harry S. C. Bacon, John M. Scheer, Walter P. Miller, Harry C. Kessler, Jr., and Jacob C. Schaut, were of sound mind and lawful age and were duly cautioned, examined and sworn to testify the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid; that I am not of counsel nor attorney for either of the parties to said suit nor in any manner interested in the result thereof.

Witness my hand and official seal this 26th day of March, A. D. 1909.

M. M. HAMILTON,
Notary Public.

[SEAL.]

Commission expires February 2, 1910.

151 Circuit Court of the United States, Eastern District of Pennsylvania, October Session, 1906.

In Equity. No. 1.

LOUIS DEJONGE & CO.
v.
BREUKER & KESSLER CO.

Proofs for final hearing, taken on the part of the above-named defendant, pursuant to adjournment, at the office of C. G. Heylmun, 1003 F street, N. W., Washington, D. C., before E. H. Parkins, examiner-in-chancery and notary public in and for the District of Columbia, acting as special examiner by counsel, on Friday, April 2, 1909, at two o'clock P. M.

Present:

S. D. Cozzens, Esq., with Goepel & Goepel, for complainant.
Frank S. Busser, Esq., for defendant.

CLARENCE G. HEYLMUN, a witness produced on behalf of the defendant, having been first duly sworn, testifies as follows in answer to interrogatories propounded

By Mr. BUSSER:

Question 1. What is your name, age, residence and occupation?

Answer. Clarence G. Heylmun: thirty; Washington, D. C.; attorney-at-law.

Q. 2. I hand you seven sheets of box paper, which are duplicates of sheets offered in evidence in this case by the complainant and marked "Complainant's Exhibit, Sundry Sheets." Please state whether you have ever seen those sheets before and, if so, in what connection?

A. I have seen these sheets before, they having been sent me by Messrs. Harding & Harding with the request that I make
152 an investigation at the Copyright Office for the purpose of ascertaining the existence of registration covering these sheets as subject matter.

Q. 3. Please state whether you made this investigation and what was the result?

A. As requested, I made this investigation at the Copyright Office and there, together with one of the officials, made a search through the records of registrations and found at that time entries which seemed to refer to but two of the samples which were sent me, one of them being the automobile design and the other the violet design. I then advised Messrs. Harding & Harding as to the result of this investigation and filed a request with the Copyright Office for an extended investigation in order to make sure that the investigation above referred to was accurate. In response to my request I received from the Copyright Office a letter, which I herewith produce, this letter being subsequently forwarded by me to Messrs. Harding & Harding.

Q. 4. Did the Copyright Office have before it at the time of the search the sheets which I handed you?

A. I delivered them in person to the party having charge of this work.

Q. 5. Were the contents of the letter which you have produced put in at your suggestion or solely at the instance of the Copyright Office?

A. I had nothing whatever to do with the contents of the letter, having made no suggestions as to what the contents should be.

Mr. Busser: The sheets handed to the witness and identified by him are offered in evidence and the notary is requested to mark the same with the title of this case and "Defendant's Exhibit, Duplicates of 'Complainant's Exhibit, Sundry Sheets.'"

(The letter produced by the witness is offered in evidence
153 and the same is marked Defendant's Exhibit, Letter from Register of Copyrights of Jan. 14, 1909.)

Q. 6. You make a specialty, do you not, of the practice of patent law and the soliciting of patents?

A. I do.

Q. 7. In the course of your practice do you ever have occasion and, if so, how frequently, to search among the files of patents in the United States Patent Office and are you familiar with the classification of patents in such files

Mr. Cozzens: Objected to as immaterial and irrelevant.

A. I have many occasions calling for investigation of the patent files and classes of invention, there being hardly a working day in which I do not make some kind of an investigation through these documents. I have had about ten years' experience in this work and believe I am well acquainted with the general scheme of classification.

Q. 8. State whether there are included in the classified files of copies of patents in the United States Patent Office copies of design patents covering designs of the general character of the designs exhibited on the sheets of box paper heretofore handed you, printed upon fabric or other articles of manufacture, and, if so, please state in what main classes and sub-classes such patents are classified, indicating in your answer the nature of the subject-matter included in such classes?

Mr. COZZENS: Same objection.

A. There are a number of sub-classes including copies of patents for designs of the same general nature as those shown on the sample sheets heretofore handed me and identified by me. These main classes and sub-classes are as follows:

Main class "Paper Manufacture," sub-class "Articles," which includes design patents for a great variety of subjects-matter, 154 for instance, box covering paper, wrapping paper, designs for paper in different forms used in advertising, various cards, such as holiday cards, fancy cards and postal cards; in fact, designs for the ornamentation of a great number of different kinds of paper.

Sub-class "Paperhanging," which includes designs for the ornamentation of wall paper, wall covering, and articles of manufacture of a similar nature. This sub-class being very large, including between five and six hundred patents.

Sub-class "Writing Paper," which includes various designs for the surface ornamentation of paper used in correspondence.

Main class "Weaving Carpets," which includes about four thousand five hundred patents, nearly all of which relate to designs for the surface ornamentation of carpets.

Main class "Weaving Fabrics." This class includes various articles of manufacture of a fabric nature, such as rugs, table cloths, towels, bed quilts, curtains, shawls, the designs being for the surface ornamentation of these articles.

Main class "Packing and Storing Vessels," sub-class "Boxes." In this sub-class are found designs for boxes and articles relating to boxes, there being several instances of designs for the surface ornamentation of covering paper for boxes.

Main class "Advertising," sub-class "Labels." This sub-class includes labels proper, cigar bands and paper sheets for application to cigar and other boxes.

Main class "Printing." Under this main class is found the sub-class of "Calico and Fabric," which includes woven fabrics to which the surface ornamentation is applied by some printing process and

includes dress goods, ribbons, and, in fact, all fabrics upon
155 which the designs are printed as distinguished from being woven.

Main class "Book Binding," sub-class "Book Covers." This sub-class includes designs for the covers of books, quite a number being for the surface ornamentation of the cover.

Mr. Cozzens: All of this answer is objected to as immaterial, irrelevant, incompetent and inadmissible.

Q. 9. Is your last answer based upon a special examination of the class of design patents as well as upon your general familiarity with the classification?

Mr. Cozzens: Same objection.

A. Yes.

Q. 10. What proportion of the designs included in those which you have enumerated are designs which constitute repeats adapted on a single sheet or surface to be duplicated with matching edges and corners?

Mr. Cozzens: Same objection and, further, as calling for secondary evidence.

A. Under those sub-classes and classes which relate to the weaving of carpets and fabrics, calico and fabric and paper hangings I should say that the great majority of the designs show repeats. As to the other classes and sub-classes I cannot state exactly what proportion of such designs exist, but there are certainly a great number of instances.

Q. 11. How about box paper?

Mr. Cozzens: Same objection.

A. As to box covering paper itself, there are a number of instances to be found under the general class of Paper Manufacture; also under the sub-class of Boxes under this same general head. Practically all of these instances show repeats.

(Direct examination closed.)

156 Cross-examination.

By Mr. Cozzens:

X Q. 12. How soon after the date of this letter from the Register of Copyrights of Jan. 14, 1909, did you receive the letter?

A. Presumably the next day.

X Q. 13. Have you any knowledge who actually wrote or dictated the typewritten portion of the letter?

A. No, sir.

X Q. 14. Have you any knowledge as to the subjects-matter of any of the numerous entries of the Gray Lithograh Co. referred to in the letter?

A. I have no knowledge as to the subjects-matter of the Gray entries.

X Q. 15. Did some employé of the Copyright Office make the

investigation of the matter inquired about, upon your request to them to investigate, in your presence?

A. He did.

X Q. 16. I mean by this, were you with him and saw him make the examination into the entries, or were you simply in the Copyright Office waiting for him to get through?

A. I was not present when the investigation which eventuated in the letter of Jan. 14, 1909, was made.

Mr. Cozzens: In view of the foregoing cross-examination, complainant's counsel objects to all of the foregoing testimony relative to the alleged acts of the Copyright Office, and also to the letter of Jan. 14, 1909, as secondary evidence and incompetent and inadmissible.

(Cross-examination closed.)

Redirect examination.

By Mr. Busser:

R. D. Q. 17. You state in one of your answers that the investigation in the Copyright Office was made in your presence and,
157 in the next answer, state that you were not present at the investigation which eventuated in the letter which you produce. Will you please explain these two answers?

A. When Messrs. Harding & Harding requested investigation to be made I called at the Copyright Office and there Mr. Crisfield, one of the employés, made a search through all of the card entries from, I believe, 1905 to date and showed me all the cards in the name of either H. S. & Le Clercq & Co. or the Gray Lithograph Co., which he was able to find. We went over these cards together, comparing the titles of entries with the designs shown on the samples in evidence and found but two entries which seemed to agree with the samples. I then left the samples with Mr. Crisfield with a request that one of the Copyright searchers make an exhaustive search in order to have absolutely accurate results, as the matter was an important one. I was assured by Mr. Crisfield that this would be done. At his request I mailed that night a written request for the search in order that they might have on record something to show for the work. I was not present when the search or investigation in response to my written request was made.

R. D. Q. 18. Did you leave with Mr. Crisfield the sheets of box paper which you identified to-day?

A. I did. They were apparently the same ones.

(Re-direct examination closed.)

Recross-examination.

By Mr. Cozzens:

R. X Q. 19. How do you know, except as Mr. Crisfield told you, that the index cards you say he showed you were all that he was able to find?

A. I have no information that they were the only cards
158 that existed except from the information he gave me.

Mr. Cozzens: In view of this answer complainant's counsel renews his objection to the whole of this testimony which relates to the Copyright Office and repeats his objection to the Copyright letter as being secondary evidence and wholly incompetent.

(Recross-examination closed.)

Re-redirect examination.

By Mr. Busser:

R. R. D. Q. 20. State whether, after receipt of this letter which you have produced, anything further was done by you in the matter of this investigation?

A. In view of the fact that the Copyright Office had been unable to find entries which apparently existed, I requested the office to permit me to make a search personally through the card digest. In compliance with this request, Mr. Miller, one of the attaches of the office, placed before me a large number of cards in the name of H. S. Le Clercq & Co. and also in the name of the Gray Lithograph Co. and told me that these would give me access to all entries of which any record had been kept. He also told me that these cards were supposed to include any entries since January, 1905. I made a search personally through these cards and was unable to find any titles of entries which would correspond to the samples in evidence with the exception of the automobile design and the violet design, for which I did find cards bearing appropriate titles. At my request the samples or specimens which were filed with the application for copyright which seemed to apply to the violet and automobile design were opened to my inspection and, upon comparison with these two designs, the specimens seemed to disclose the same design shown on the samples in evidence.

159 Mr. Cozzens: So much of the answer as relates to what was told the witness is objected to as hearsay and incompetent.

Re-recross-examination.

By Mr. Cozzens:

R. R. X Q. 21. Of course you have no knowledge, except as you were told by Mr. Miller, that those index cards which you looked over were all that were there?

A. No, except that they constitute a public record supposed to be complete.

R. R. X Q. 22. But, if I understand you, what you looked at were the index cards which Mr. Miller handed you?

A. That is correct.

R. R. X Q. 23. And you have no knowledge that they were all of the cards which were there?

A. I have no such knowledge.

Stipulation.

It is stipulated by and between counsel for the respective parties, first, that the letter marked Defendant's Exhibit, Letter from Register of Copyrights of Jan. 14, 1909, may be offered in evidence with the same force and effect as if the writer of the letter had been produced as a witness and stated that he wrote it; second, that the letter mentioned emanated, as it purports to, from the Copyright Office; third, that the letter refers to the sheets testified to by the witness Heylmun as having been left by him with Mr. Crisfield.

This stipulation is made subject to all foregoing objections entered by complainant's counsel to the testimony in reference to the Copyright Office and search not inconsistent with this stipulation.

(Examination of this witness closed.)

(Signed) CLARENCE G. HEYLMUN.

160 Circuit Court of the United States, Eastern District of Pennsylvania, October Session, 1906.

In Equity. No. 1.

LOUIS DEJONGE & CO.

v.

BREUKER & KESSLER CO.

DISTRICT OF COLUMBIA, *ss:*

I, E. H. Parkins, Examiner-in-Chancery and Notary Public in and for the District of Columbia, hereby certify that the above witness, Clarence G. Heylmun, was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that his deposition was taken down by me stenographically in the presence of the witness and from his statements and subsequently reduced to writing by me on a typewriting machine, and when completed read over by said witness and subscribed by him in my presence; that said deposition was taken pursuant to adjournment at the office of C. G. Heylmun, 1003 F street, N. W., Washington, D. C., beginning on the second day of April, 1909, and completed on the same day, as set forth; that the parties were represented at the taking of said deposition by their respective counsel *at* set forth; that the several exhibits recited were offered in evidence and marked as specially noted in the foregoing deposition; and that I am not counsel or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof, I have hereunto set my hand and official seal this 5th day of April, A. D. 1909.

[SEAL.] E. H. PARKINS,

Examiner-in-Chancery and Notary Public, D. C.

161 Circuit Court of the United States, Eastern District of Pennsylvania, October Session, 1906.

In Equity. No. 1.

LOUIS DEJONGE & CO.

v.

BREUKER & KESSLER CO.

PHILADELPHIA, *April 26th*, 1909.

Proofs for Final Hearing Taken on the Part of the Above-named Defendant, Pursuant to Agreement, at the Office of Harding and Harding, 927 Land Title Building, Philadelphia, Pennsylvania, at 11 o'clock a. m.

Present:

S. D. Cozzens, Esq., of counsel with Goepel and Goepel, for complainant.

Frank S. Busser, Esq., for defendant.

Counsel for defendant offers in evidence the following:

Certified copy of the original record of copyright of the painting entitled "Nosegay," No. 2900 Q. 1885, and the Examiner is requested to mark the same "Defendant's Exhibit Certificate of record of copyright of 'Nosegay' Painting".

Counsel for defendant also offers in evidence a sheet of box paper containing repeats of reproductions of the subject matter of the alleged copyrighted painting, and the notary is requested to mark the same "Defendant's Exhibit Sheet of Complainant's Box Paper No. 1."

It is stipulated that this sheet of box paper is of complainant's manufacture.

Counsel for defendant also offers in evidence a sheet of box paper, and requests the Examiner to mark the same "Defendant's Exhibit Sheet of Complainant's Box Paper No. 2".

162 It is stipulated that the last named sheet of box paper is of complainant's manufacture and that the subject matter thereof was copyrighted as a painting by the complainant in 1907.

Counsel for defendant also offers in evidence a repeat cut from a sheet of box paper identical with "Defendant's Exhibit Sheet of Complainant's Box Paper No. 1" and the Examiner is requested to mark the same "Defendant's Exhibit Repeat of Complainant's Design."

Defendant's counsel also offers in evidence a repeat cut from a sheet of box paper, identical with "Complainant's Exhibit Defendant's Product," and the Examiner is requested to mark the same "Defendant's Exhibit Repeat of Defendant's Design".

Counsel for defendant also offers in evidence, as a single exhibit, a number of officially printed uncertified copies of design patents

and the Examiner is requested to mark the same "Defendant's Exhibit Copies of Typical Design Patents."

It is stipulated that these copies of patents may be offered in evidence with the same force and effect as if they, or each of them, had been duly certified by the U. S. Patent Office; but the exhibit itself is objected to by counsel for complainant as immaterial and irrelevant.

(Adjourned until 2 p. m.)

After Recess.

FRANK GREEN, a witness called on behalf of defendant, being duly sworn, deposes and says as follows, in answer to questions asked

By Mr. BUSSER:

Q. 1. What is your name, age, residence, and occupation?

163 A. Frank Green; age, 43 years; residence, 2265 Van Pelt street, Philadelphia; occupation, designer for textile fabrics.

Q. 2. By whom are you now employed?

A. Stead, Miller and Company.

Q. 3. How long have you been in their employ?

A. Between three and four years.

Q. 4. What experience have you had as a designer prior to your employment by Stead, Miller and Company?

A. About seven years with Hoyle, Harrison and Kaye, about 9 years as a public designer in Philadelphia. I was in business a number of years in England, as a public designer. The balance of the time was learning the business.

Q. 5. For what articles of manufacture, during your experience as a designer, have you made any designs?

A. Lace, wall paper, and textile fabrics, such as silk brocades, portiere draperies, etc.

Q. 6. I hand you an exhibit marked "Complainant's Exhibit Copyrighted Painting," and asked you to examine the subject matter and state, if you can tell, from a mere inspection, what the same is?

A. It is undoubtedly a design as I think any designer would know from a mere inspection. I mean by a design, a sketch which has a repeat. That is my definition of a design. I still think it is a work of art, although not a pictorial work of art. I class it as a decorative work of art.

Q. 7. Are you able to form any judgment from an inspection of the design to what the same is probably intended to be applied.

(Objected to as immaterial and irrelevant.)

A. That is to what article of manufacture?

Q. 8. Yes.

(Same objection.)

164 A. Well, I could not say exactly what it is intended for, but decidedly it is for reproduction, as is shown by the repeat. A pictorial work of art, to my knowledge, never has a repeat.

Q. 9. Would or would not a design of the character of the one submitted to you be designated in the profession with which you are identified a "painting"?

(Objected to as immaterial and irrelevant, it not being important what any particular profession might designate the exhibit.)

A. Decidedly not.

Q. 10. Does or does not the design that has been submitted to you differ in principle from designs that you yourself have made in the practice of your profession as applied to wall paper, textile fabrics, etc.?

(Objected to as immaterial and irrelevant, and also as inadmissible unless the design referred to is produced for comparison.)

A. It does not differ.

Q. 11. I ask you to compare the design of "Complainant's Exhibit Copyrighted Painting" with the sheet of box paper marked "Complainant's Exhibit Defendant's Product," and ask you to state whether, in your opinion, the two designs are substantially the same or substantially different.

A. So many designs have totally different features on being reproduced that—I will put this way—many designs have features that are hidden when only one repeat is shown. I think that covers it. The only likeness I see is in the use of holly and mistletoe. The uses of the holly and mistletoe, as far as I can see are totally different from the first exhibit.

Q. 12. In view of the first part of your last answer I will ask you to compare "Complainant's Exhibit Defendant's Product" with "Defendant's Exhibit Sheet of Complainant's Box Paper No. 1"
165 and state whether the two designs embodied therein are substantially the same or substantially different?

(Objected to as incompetent, because not the proper standard of comparison.)

A. In the Defendant's design I find that the use of the stems of the pine forms a square, a feature not seen in the complainant's design. Also the pine cones is a feature not seen in the complainant's design. In find the grouping altogether, and the total effect quite distinct. I could go into minor details, but everything is quite different.

Q. 13. Apart from the similarity of the subject matter, namely, the use of holly and mistletoe, to which you have referred in your answer to Q. 11, what, if any, parts of the two designs, do you find to be alike? I refer to "Complainant's Exhibit Copyrighted Painting" and "Complainant's Exhibit Defendant's Product".

A. I do not see similarity even in a leaf. I see no two features alike.

Q. 14. In your experience, as a designer, what is the usual disposition made of original designs after the same have been reproduced?

(Objected to as immaterial and irrelevant.)

A. In all the manufacturing concerns I have been connected with they are filed away for future reference for a number of years and then are put in the furnace.

(Direct examination closed.)

Cross-examination.

By Mr. COZZENS:

X Q. 15. In your answer to Q. 6, did you use the word "pictorial" in the sense of representation of a picture of some kind?

166 A. A pictorial artist, as I understand it, is a person who paints pictures for decoration, that is to frame, to decorate the walls of a room. A decorative artist is a person who makes designs for reproduction on some paper, fabric, metal work, etc.

X Q. 16. Then, if I understand you, you did use the word "pictorial" in the sense of representing something in the nature of a picture?

A. Yes.

X Q. 17. In your twelfth answer, where you speak of the stems of the pine in what you there term "Defendant's Design" forming a square and the pine cones, and what you term the "grouping," did you mention all of the principal differences which you find between the said "Defendant's Design" and "Complainant's Design"?

A. No. I see another great difference. In the "Defendant's Design" the use of the pine makes a very different feature from the heavier use of the spruce in "Complainant's Design".

X Q. 18. Now, with this added to the differences you mention in the twelfth answer, have you now stated all the principal differences you find between the two designs?

A. Yes.

(Cross-examination closed.)

(Deposition closed.)

(Signature waived.)

167–169 Circuit Court of the United States, Eastern District of Pennsylvania, October Session, 1906.

In Equity. No. 1.

LOUIS DEJONGE AND COMPANY

v.

BREUCKER AND KESSLER COMPANY.

I, M. M. Hamilton, a notary public in and for the County of Philadelphia, State of Pennsylvania, Eastern District of Pennsylvania, do certify that the within and foregoing deposition was taken before me at the time and place therein stated; that the witness therein named, Frank Green, was of sound mind and lawful age and was duly cautioned, examined and sworn to testify the truth, the whole

truth and nothing but the truth in the matter of controversy aforesaid; that I am not of counsel nor attorney for either of the parties to said suit nor in any manner interested in the result thereof.

Witness my hand and official seal this 26th day of April, A. D. 1909.

M. M. HAMILTON,
Notary Public.

[SEAL.]

Commission expires February 2, 1910.

171 & 172 United States Patent Office.

Jesse Heiss, of Berlin, New Jersey, Assignor to Breuker and Kessler Company, of Philadelphia, Pennsylvania, a Corporation of Pennsylvania.

Design for Box-Paper.

No. 38,281.

Specification for Design.

Patented Oct. 9, 1906.

Application filed August 1, 1906. Serial No. 328,803. Term of Patent 3½ Years.

To all whom it may concern:

Be it known that I, Jesse Heiss, a citizen of the United States residing at Berlin, county of Camden, and State of New Jersey, have invented a new, original, and ornamental Design for Box-Paper, reference being had to the accompanying drawing for an illustration of the same.

I claim—

The ornamental design for box-paper, as shown.

JESSE HEISS.

Witnesses:

ALBERT CROSS.
HARRY KESSLER, JR.

(Here follows diagram marked p. 170.)

170

DESIGN.

No. 38,281. PATENTED OCT. 9, 1906.

J. HEISS.

BOX PAPER.

APPLICATION FILED AUG. 1, 1906.

Witnesses.

W. M. Hamilton

L. M. Ursan

Inventor:

Jesse Heiss

by Harding & Harding

Attorneys

173

No. 14.

F. W. A.—C. L. B.

LIBRARY OF CONGRESS,
COPYRIGHT OFFICE,
WASHINGTON, D. C., *January* 14, 1909.

In reply quote file No. 257,052.

DEAR SIR: I have the honor, by direction of the Librarian of Congress, to acknowledge the receipt of your recent letter of inquiry. Careful search has been made in the various files and indices of this office, with the result stated below.

If this information is not sufficient for your purpose, further search will gladly be made if you can furnish additional data upon which to base a more extended examination. Copyright entries are indexed under the names of copyright claimants, and in order to determine whether any given work has been entered it is generally necessary to know the name of the supposed claimant of copyright and the title of the work.

Moreover, it should be borne in mind that the entries in this office are very numerous (126,484 in 1907) and that some time is required for indexing these entries. If, therefore, the inquiry relates to any recent registration, the index cards may not yet be available, and some clue to the date of the application for copyright should be furnished to insure a positive statement as to possible entry.

This office can give no assurance that any specific title has not been used.

Respectfully,

THORVALD SOLBERG,
Register of Copyrights.

F. W. A.

Mr. C. G. Heylmun, 1003 F street, N. W., Washington, D. C.

174

Result of Search.

Photographs of designs entered by H. S. Le Clercq & Co., as "Automobile design" Nov. 30, 1906, and "Violet design" Nov. 7, 1907, appear to be similar to two of your sheets which I have marked, but I have been unable to find any entry in the name of H. S. Le Clercq & Co., corresponding with the "Egyptian pattern".

The entries of the Gray Lithograph Company are so numerous that it is impossible for this office to make such a comparative examination of the copies of their works which have been deposited.

The sheets you sent, however, seem rather designs for wall paper or box paper and as such would be protected under Revised Statutes Section 4929 rather than under the copyright law.

Your samples are returned under separate cover.

Circuit Court of the United States, Eastern District of Pennsylvania. In Equity. Louis De Jonge & Co. v. Breuker & Kessler Co. Defendant's Exhibit. Letter from Register of Copyrights of Jan. 14, 1909. E. H. Parkins, Notary Public, &c.

175 *Final Hearing.*

(Opinion Filed October 26, 1910.)

McPHERSON, *District Judge.*

This suit concerns the copyright upon a painting. The dispute arose before the passage of the Act of March 4, 1909, and is to be decided under the statutes previously in force. The facts are not in controversy and may be stated as follows:

In September, 1905, the plaintiff copyrighted a small painting in water colors, describing it in these words:

"Holly, Mistletoe, and Spruce. The painting consists of the representation of small branches or sprigs of the flowers of holly, mistletoe and spruce arranged in the form of an open cluster, the cluster having substantially the outline of a square."

For present purposes infringement may be assumed. The principal defense is that the painting was not the subject of copyright at all, but should have been patented under Sec. 4929 of the Revised Statutes as a design for an article of manufacture. In my opinion the testimony does not sustain this defense. Whatever force the argument may possess where a painting is obviously a mere design and can be nothing else, it is not persuasive where the painting may with equal propriety belong either to the fine, or to the useful arts. It clearly appears that the painting now in question is artistic in thought and execution, and it was, therefore, entitled to protection by a copyright, if a copyright was desired. It appears just as clearly that neither the artist nor his patron intended to reproduce the painting as such a work of art is ordinarily reproduced, but intended to multiply it as a design for a fancy paper to cover boxes and other articles for the holiday season. Nevertheless, when the painting left the artist's hand it was of such a character as made it eligible
176 either for copyright or for patenting at the option of the author or owner. As it seems to me, the Act of 1874 (18 Stat. 78) did not forbid it to be copyrighted; a reproduction would certainly not be a "label," and, while no doubt it might be a "print" and might with propriety be regarded as "designed to be used for (an) article of manufacture," it could with equal propriety be described as a "pictorial illustration or work connected with the fine arts"—quite as accurately as the circus posters that were thus classified in Bleistein v. Donaldson, &c., Co., 188 U. S. 239—and, therefore, it could not be definitely assigned for the present purpose either to the fine or to the useful arts until the author or the owner decided under which statute he would protect his property.

It is, I think, difficult to see how a painting that may be either copyrighted or patented can be said to be "designed" for one rather than for the other form of protection until the author or owner makes his final choice. Up to that time he may do what he pleases with his property. If he chooses to copyright it as a work of art, he may do so; if he prefers to patent it as a design, he is free to do this also; and the mere fact that he originally intended to take one of these

courses rather than the other does not prevent him from changing his purpose at the last moment. His state of mind upon this matter has nothing to do with the quality of the painting; and it is this quality and not the intention of the author or owner that determines what protection may be given to the artist's work.

In the present instance the artist was commissioned to produce a design for the useful arts; in executing the commission, he produced a painting of artistic excellence, original and pleasing, merely regarded by itself as a picture, and also original and ornamental as a design; and with such a work in his possession the owner or
177 author might treat and protect it in either of its aspects. Since it was qualified for admission into the two statutory classes, I see no reason why it might not be placed in either. But it could not enter both. The method of procedure, the term of protection, and the penalties for infringement, are so different that the author or owner of a painting that is eligible for both classes must decide to which region of intellectual effort the work is to be assigned, and he must abide by the decision. Ordinarily, of course, there is no difficulty. Not many paintings are suitable for use as designs, and only a few designs possess the qualities demanded by the fine arts. But it is easily conceivable that here and there a painting may be eligible for either class, and the water color in question is, I think, an excellent example. Such a work may be used in both the fine and the useful arts; but it can have protection in only one of these classes. The author or owner is driven to his election, and must stand by his choice.

The precise question is apparently of first impression. None of the cases that I have examined seems to decide it, as a brief review may make clear. Scoville v. Toland (1848), Fed. Cases, No. 12,553, merely decided that a label asserting the excellence of a medicine and intended to be affixed to a bottle was not a "book," and was not the subject of a copyright. This ruling was cited with approval in Higgins v. Keuffel, 140 U. S. 428. In Rosenbach v. Dreyfuss (1880), 2 Fed. 217, the articles in question were "Prints of balloons and hanging baskets, with printing on them for embroidery, and cutting lines showing how the paper may be cut and joined to make the different parts fit together, and not intended as a mere pictorial representation of something;" and it was held that they were not copyrightable. The Act of 1874 was considered, and the
178 articles were decided not to be "pictorial illustrations or works connected with the fine arts," but "prints or labels designed to be used for other articles of manufacture." This being so they did not belong to the fine arts, and could not be copyrighted, although they might be patented under Sec. 4929 of the Revised Statutes. As the syllabus correctly states, Ehret v. Pierce (1880), 10 Fed. 553, decided only that:

"An advertising card devised for the purpose of displaying paints of various colors, consisting of a sheet of paper having attached thereto square bits of paper painted in various colors, each square having a different color, with some lithographic work surrounding

the squares advertising the sale of the colors, is not the subject of a copyright"—

there being no artistic quality in the device. In Yuengling v. Schile (1882), 12 Fed. 97, it was held that copies of a chromo lithograph entitled "Gambrinus and his Followers," were protected by copyright, although they were intended, used and circulated as a gratuitous advertisement for the benefit of the plaintiff's private business as a brewer and not for the instruction or improvement of the public. The picture was not a design in any sense, it was reproduced separately in the usual manner. In the course of the opinion Judge Brown said, page 100:

"The plaintiff's chromo in the present case is not a mere engraving or print of any article which the complainant offers for sale. It is a work of the imagination, and has such obvious artistic qualities as in my judgment render it fairly a subject of copyright, without regard to the use which the plaintiff has made or may intend to make, of it. Where the work in question is clearly one of artistic merit, it is not material in my judgment whether the person claiming a copyright expects to obtain his reward directly through a sale of the copies, or indirectly through an increase of profits in his business to be obtained through their gratuitous distribution."

179 In Schumacher v. Schwencke (1885), 25 Fed. 466, it was decided that a painting upon which artistic skill had been expended was copyrightable, although it could be readily lithographed and used as an advertising label. Judge Coxe's language is as follows:

"It is contended by the defendants that the complainant's painting was designed as a label for cigar boxes. This, it is said, is evidenced by its size, and by the fact that copies appear to be advertised in complainant's catalogue of labels. That lithographic copies are applicable to this purpose cannot be denied. They may also be used for many other purposes. The proof in this case discloses some of them. But the subject of the copyright is, in fact, a painting, executed by an artist with pencil and brush, and can itself be used only as paintings are used. The fact that copies may be utilized for advertising purposes does not change the character of the original. If the painting itself is to be considered a label because copies may be so used, no masterpiece would escape such desecration. It will hardly do to call the Sistine Madonna or the Aurora, labels, because by the sacrilege of modern enterprise copies of Raphael's Cherubs or Guido's Goddess may be transferred to a blacking box or a perfumery bottle. Were it contended that this painting was intended exclusively for a label, or as the first step in making a label, a much stronger case for the defendants would be presented. But such is not the fact, and it is clear from the affidavits that it cannot be established by evidence."

In Schumacher v. Wogram (1888), 35 Fed. 210, it appeared that the plaintiffs were manufacturers of prints or labels, selling them for the purpose of being affixed to cigar boxes and other articles. They copyrighted a picture representing a young woman holding a bouquet of flowers, entitled "Nosegay." From this they struck off

prints which they sold to dealers in cigars, substituting the
180 words "Opera Bouquet" (a name descriptive of a brand of cigars), in place of the word "Nosegay." An action was brought to restrain infringement of some of these prints. Judge Wallace denied a motion for a preliminary injunction, saying:

"The facts show an attempted evasion by the plaintiffs of the provisions of section 3 of the Act of Congress of June 18, 1874, 'to amend the law relating to patents, trade-marks and copyrights.' That section declares, in substance, that no prints or labels designed to be used for any article of manufacture can be copyrighted, but authorizes them to be registered and protected as trade-marks in proper cases. If the experiment of the plaintiffs can succeed, this statute is inoperative whenever the prints or labels contain a pictorial illustration; and it could be wholly nullified by the device of printing pictures on the labels. The case of Schumacher v. Schwencke, 25 Fed. Rep. 466, is distinguishable from the present because in that case the Court found that the picture copyrighted was not made to be used for labels."

Evidently, I think, none of these cases determines the exact question presented by the facts now being considered, namely, whether a painting possessing artistic merit, but suitable also for use as a design, may at the owner's election be protected either by copyright or by patent? As already indicated, I believe the question should be answered in the affirmative. But it follows that if the owner or author treat the picture as belonging to the fine arts and protect it by copyright, he must strictly obey the copyright laws. He must treat each reproduction as a separate copy of the original, and must mark it as Congress has prescribed. Reasonable freedom in the form of marking is permitted, if the substantial requisites are present. Blume v. Spear (1887), 30 Fed. 629; Sarony v. Burrow-Giles Co., 111 U. S. 53; but as far as I am advised the requirement has
181 not been relaxed that each separate reproduction of a copyrighted painting must bear the statutory notice. Pierce, &c., Co. v. Werckmeister (C. C. A.), 72 Fed. 57. The case of Edison v. Lubin (C. C. A., 3d Circuit), 122 Fed. 240, is not at all in conflict with this statement. It was there held that a sheet containing a series of 4500 small pictures, intended to be reproduced in a motion camera, was a single "Photograph," and was protected by a single copyright notice attached to one end of the sheet. The reproduction of the subject matter was not complete until every small picture had contributed its share to the total effect. Being, therefore, essentially a single "photograph," one marking was enough.

In the present case the plaintiff did not attempt to reproduce the painting separately in order to sell the copies in that form. On the contrary, twelve complete copies were lithographed and printed upon one sheet, the picture having been so painted that each copy would join harmoniously with its neighbors, and the repeated design would thus produce a pleasing decorative effect. But there were twelve reproductions of the painting, while the sheet was marked in only one place with the notice required by law. In other words, the plaintiff having copyrighted a work of the fine arts, attempted to repro-

duce it as if it had been patented as a mere design, and has naturally gotten into a fatal difficulty. The copyright could only protect the reproductions if each separate copy should be marked, and as this was not done the statutory protection was vitiated. It is argued for the plaintiff that notice need only be given to the purchaser of the sheets, who is ordinarily the manufacturer of the boxes or other articles to be covered, and that a single marking upon each sheet is ample for this purpose. But this argument ad inconvenienti can have no weight against the positive command of the statute.

182 The plaintiff would have probably had no trouble about notice if the picture had been patented as a design. It was intended for such a use, and the protection that was needed could have been best obtained under section 4929. But as another kind of protection was also available and was chosen, its express requirements must be strictly obeyed. The Court need not be astute in finding a way to give the plaintiff the appropriate protection that was offered by Congress, but was not accepted.

It is, no doubt, true that difficult questions are sometimes presented to the Librarian of Congress in the administration of the copyright statutes, but in the nature of the subject such question cannot be always avoided. If a painting is obviously artistic, it is, I think, entitled to copyright, whatever the applicant may intend to do with the reproductions. Whether he can adequately protect them under the copyright law, and still use them as he may wish, is his affair. His common sense will be likely to inform him correctly upon this subject. If, however, the painting is obviously a mere design, lacking in such artistic quality as entitles it to be ranked among the reproductions of the fine arts, copyright may be properly refused. And it is not difficult to conceive of a third situation in which the Librarian may well be in doubt what his decision should be. In that event it is probable that he may find it most desirable not to interfere with the applicant's choice, leaving him to take the consequences of his election. As it seems to me, if applicants understand clearly that they cannot apply for protection of one kind and hope to receive protection of the other, they will probably be very careful to ask for precisely what they want.

The bill may be dismissed at the plaintiff's costs.

183 *Final Decree.*

(Filed December 16, 1910.)

Before McPherson, J.

This case coming on to be heard on the pleadings and proofs and having been argued by S. D. Cozzens, Esq., and C. P. Goepel, Esq., for complainant, and by Frank S. Busser, Esq., and George J. Harding, Esq., for defendant, upon due consideration thereof, it is, this 16th day of December, 1910, Ordered, Adjudged and Decreed, that

the bill of complaint be dismissed and the complainant directed to pay the costs.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

Form of decree approved:

GOEPEL & GOEPEL,
Solicitors for Complainant.
HARDING & HARDING,
Solicitors for Defendant.

Assignment of Errors.

(Filed June 5, 1911.)

And now comes the complainant by Goepel & Goepel, its solicitors, and having prayed an appeal to the United States Circuit Court of Appeals for the Third Circuit, from the decree of said United States Circuit Court, entered on the 16th day of December, 1910, dismissing the bill of complaint in this cause, respectfully represents as assignment of errors herein, that the said Honorable Circuit Court erred in the following particulars:

(1) In dismissing the bill of complaint.

184 (2) In refusing to decree that the complainant had in all cases given notice of its said copyright by inscribing upon a visible portion of each one of the several copies of every edition published by it of the said painting, the following words: "Copyrighted, 1905, by Louis Dejonge & Co."

(3) In not holding that the marking on the sheets was a good and sufficient marking and in full compliance with the Copyright Act of 1874 (18 Stat. 78).

(4) In construing that portion of the Copyright Law relating to notices in a strict sense rather than in a liberal sense, and, therefore, in holding the notices on the sheets of the complainant insufficient.

(5) In not granting a decree for complainant finding that the defendant has in all respects infringed complainant's copyright.

(6) In refusing to enjoin and restrain the defendant and its agents from copying, printing and publishing complainant's copyrighted painting, either substantially or in whole or in part, and also from selling or exposing to sale any copy or copies of the said painting or any such reproductions thereof which in conception, design or execution shall be substantially the same as the said painting in whole or in part.

Wherefore, the complainant prays that the decree may be reversed in the particulars hereinbefore set forth.

GOEPEL & GOEPEL,
Solicitors for Complainant.

290 Broadway, Dun Bldg., Borough of Manhattan, New York City.

MESSRS. HOWSON & HOWSON,
Resident Associate Solicitors.

West End Bldg., 32 South Broad St., Philadelphia, Pa.

SEWARD DAVIS,
Of Counsel.

185 *Petition for Appeal.*

(Filed June 5, 1911.)

The above complainant conceiving itself aggrieved by the decree of the 16th day of December, 1910, in the above-entitled cause, hereby appeals from the said decree to the United States Circuit Court of Appeals for the Third Circuit, for the reason specified in the assignment of errors which is filed herein, and said complainant prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit.

Dated New York, May 22, 1911.

GOEPEL & GOEPEL,
Sol'rs for Comp't.

290 Broadway, Dun Building, Borough of Manhattan, City of New York.

MESSRS. HOWSON & HOWSON,
Resident Associate Solicitors.

West End Bldg., 32 S. Broad St., Philadelphia, Pa.

SEWARD DAVIS,
Of Counsel.

Before McPherson, J.

Petition for appeal allowed.

BY THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.
June 5, 1911.

186 *Præcipe for Transcript of Record Sur Appeal.*

(Filed June 5, 1911.)

To the Clerk of the above-named Court:

SIR: You will please prepare transcript of record in this cause to be filed in the office of the clerk of the United States Circuit Court

of Appeals for the Third Judicial Circuit under the appeal heretofore perfected to said Court and include in said transcript the following pleadings, proceedings and papers on file, to wit:

All the testimony heretofore filed on behalf of the complainant.

All the testimony filed on behalf of the defendant. The amended bill of complaint on file; the answer on file; and the replication on file.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Third Circuit, and to file the same in the office of the clerk of said United States Circuit Court of Appeals at Philadelphia before June 16, 1911.

GOEPEL & GOEPEL,
Sol'rs for Appellant.

Dated New York, June 1 '11.

187

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Breuker & Kessler Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia within thirty days, pursuant to an appeal filed in the Clerk's Office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein Louis Dejonge & Company is Appellant and you are Appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John B. McPherson, Judge, holding of the Circuit Court of the United States this 5th day of June, in the year of our Lord one thousand nine hundred and eleven.

BY THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.

Service accepted.
HARDING & HARDING,
Attorneys for Appellee.
June 6, 1911.

188

Clerk's Certificate.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

I, Henry B. Robb, Clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful

copy of the original pleas and proceedings in the case of Louis Dejonge & Company v. Brueker & Kessler Company, No. 1, October Session, 1906, as per praecipe filed, a copy of which is hereto annexed, on file and now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Philadelphia, this 10th day of June, in the year of our Lord one thousand nine hundred and eleven, and of the independence of the United States the one hundred and thirty-fifth.

[SEAL.]

HENRY B. ROBB,
Clerk of C. C.,
By GEORGE BRODBECK,
Deputy Clerk.

(Endorsed: No. 1521. Sessions. — Circuit Court United States, Eastern District of Pennsylvania. Certified Copy. Received and Filed. June 12, 1911. Saunders Lewis, Jr., Clerk.)

189 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1911.

No. 1521.

LOUIS DEJONGE & COMPANY, Appellant,
vs.
BREUKER & KESSLER COMPANY, Appellee.

And afterwards, to wit, on the eleventh day of October, 1911, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, and Hon. W. M. Lanning, Circuit Judges, and the Court not being fully advised in the premises takes further time for the consideration thereof.

And afterwards, to wit, on the sixth day of November, 1911, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

190 United States Circuit Court of Appeals, Third Circuit, October Term, 1911.

No. 26.

LOUIS DEJONGE & COMPANY, Appellant,
vs.
BREUKER & KESSLER CO., Appellee.

On Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Before Gray, Buffington, and Lanning, Circuit Judges.

LANNING, *Circuit Judge:*

In this case the circuit court decided (182 Fed. 150) that a painting, if it possess artistic merit and be suitable also for use as a design,

may at the owner's election be protected either by copyright or by patent. On this broad question we express no opinion. The case before us can be disposed of on the ground that, assuming that the complainant's painting is such a one, the statutory conditions precedent to the investiture of the right to protection under the copyright law have not been complied with. For seventy-five years it has been the settled law of this country that protection under the copyright law is granted only to those who perform the conditions essential to a perfect copyright title. Wheaton v. Peters, 8 Pet. 591, 665; Merrell v. Tice, 104 U. S. 557, 560; Callaghan v. Myers,
191 128 U. S. 617, 652; Thompson v. Hubbard, 131 U. S. 148-150; Higgins v. Keuffel, 140 U. S. 428; Pierce & Bushnell Mfg. Co. v. Werckmeister, 72 Fed. 54; Osgood v. A. S. Aloe Instrument Co., 83 Fed. 470; Freeman vs. The Trade Register, 173 Fed. 419. Copyright protection is wholly statutory and one who claims it must prove affirmatively his performance of all the statutory conditions precedent to his right of action.

In the case before us the subject of the alleged copyright is a painting. Section 4952 of the Revised Statutes gives to each author or proprietor of a painting, upon complying with the provisions of the chapter concerning copyright, the sole liberty of copying and vending the same. The first section of the act of June 18, 1874, which supersedes section 4962 of that chapter, declares that no person shall maintain an action for the infringement of his copyright "unless he shall give notice thereof, * * * if a * * * painting, * * * by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words" &c. This language means that each reproduction or copy of the painting must be accompanied with the statutory notice, as the circuit court properly held. It is not sufficient to affix the notice to one in each dozen reproductions of the painting, as was done in this case. Section 4952, which gives to the author or proprietor of a painting the sole liberty of copying it, and selling the copies, and section 1 of the Act of June 18, 1874, concerning notice, taken together, mean that no perfect title to a copyright can be had unless every copy sold contains the prescribed notice. The
192 purpose of the notice is to inform the public. Obviously, a single notice on a sheet containing a dozen copies of a painting is not the notice contemplated by congress.

The decree dismissing the bill of complaint is affirmed for want of a sufficient copyright notice.

Endorsed: No. 1521. Opinion of the Court. Received and Filed, November 6, 1911. Saunders Lewis, Jr., Clerk.

193 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1911.

No. 1521 (List No. 26).

LOUIS DEJONGE & COMPANY, Appellant,
vs.
BREUKER & KESSLER CO., Appellee.

Appeal from the Circuit Court of the United States, for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, on the ground that sufficient copyright notice was not given by the complainant, with costs.

Philadelphia, November 7, 1911.

W. M. LANNING,
Circuit Judge.

Endorsed: No. 1521. Order Affirming Decree. Received and Filed Nov. 7, 1911. Saunders Lewis, Jr., Clerk.

194 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1911.

No. 1521 (List No. 26).

LOUIS DEJONGE & COMPANY, Appellant,
vs.
BREUKER & KESSLER CO., Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

And now, to wit, this 7th day of December, A. D., 1911, it is ordered that Mandate issue to the said Circuit Court of the United States, for the Eastern District of Pennsylvania, in accordance with the Opinion and Decree of this Court in said cause.

W. M. LANNING,
Circuit Judge.

Endorsed: No. 1521. Order for Mandate. Received and Filed December 7, 1911. Saunders Lewis, Jr., Clerk.

195 United States Circuit Court of Appeals for the Third Circuit.

LOUIS DEJONGE & COMPANY, Appellant,
against
BREUKER & KESSLER CO., Appellee.

In Equity.

SIRS: Take notice that the appellant Louis Dejonge & Company has taken its appeal from the decree of the United States Circuit Court of Appeals in the above-entitled cause to the Supreme Court of the United States, and that there is herewith served upon you a copy of the petition for appeal, order allowing appeal, assignment of errors, and bond on appeal, and the citation on appeal is herewith served upon you.

Dated, New York, December 28, 1911.

Yours, etc.,

(Signed) SEWARD DAVIS,
Of Counsel for Appellant.

(Signed) HOWSON & HOWSON,
Solicitors for Appellant.

To Harding & Harding, Esqs., Solicitors for Appellee, Breuker & Kessler Company, 927 Land Title Building, Philadelphia, Pa.:

Due and timely service of a copy of the above notice is hereby admitted this 29th day of December, 1911.

(Signed) FRANK S. BUSSER,
Solicitor for Appellee.
HARDING & HARDING,
Per FRANK S. BUSSER,
Solicitors for Appellee.

Endorsed: No. 1521. Notice of Appeal. Received and Filed December 29, 1911. Saunders Lewis, Jr., Clerk.

196 United States Circuit Court of Appeals for the Third Circuit.

LOUIS DEJONGE & COMPANY, Appellant,
against
BREUKER & KESSLER COMPANY, Appellee.

The above named appellant, Louis De Jonge & Company, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Third Circuit, and that a judgment has therein been rendered on or about the 7th day of December, A. D., 1911, affirming the decree of the Circuit Court of the United States for the Eastern District of Pennsylvania, and that the matter in controversy in said suit exceeds One thousand dollars besides costs, and the above-named appellant, conceiving it-

self aggrieved by the decree aforesaid, does hereby appeal from the said judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith.

Wherefore the said appellant prays that its appeal be allowed it in the above-entitled cause directing the Clerk of the United States Circuit Court of Appeals for the Third Circuit to send the record and proceedings in such cause, with all things concerning the same, duly authenticated, to the Supreme Court of the United States, in order that the errors complained of, as aforesaid, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

(Signed) SEWARD DAVIS,
Of Counsel for Appellant.
HOWSON & HOWSON,
Solicitors for Appellant.

Endorsed: No. 1521. Petition for Appeal. Received and Filed December 29, 1911. Saunders Lewis, Jr., Clerk.

197 United States Circuit Court of Appeals for the Third Circuit.

LOUIS DEJONGE & COMPANY, Appellant,
against
BREUKER & KESSLER COMPANY, Appellee.

It is hereby ordered that the appeal in the above-entitled cause to the Supreme Court of the United States be and the same hereby is allowed as prayed.

Dated December 28, 1911.

(Signed) W. M. LANNING,
United States Circuit Judge, Third Circuit.

Endorsed: No. 1521. Order Allowing Appeal. Received and Filed December 29, 1911. Saunders Lewis, Jr., Clerk.

198 United States Circuit Court of Appeals for the Third Circuit.

LOUIS DEJONGE & COMPANY, Appellant,
against
BREUKER & KESSLER COMPANY, Appellee.

The appellant in the above-entitled cause, in connection with its petition for appeal herein, presents and files therewith its assignment of errors, and respectfully shows that in the record and proceedings herein there is manifest error in that the United States Circuit Court of Appeals for the Third Circuit, in its decree rendered herein on the 7th day of December, A. D., 1911, erred in this, to wit:

First. In affirming the decree of the Circuit Court dismissing appellant's bill of complaint.

Second. In holding that the statutory conditions precedent to the investiture of the right to protection under the copyright law had not been complied with by appellant.

Third. In holding that the appellant had failed to give due notice of its copyright in accordance with the provisions of the United States Revised Statutes in such case made and provided, to wit, the Act of June 18, 1874, Chapter 301, (18 U. S. Statutes at Large, 78.)

Fourth. In refusing to hold, adjudge and decree that the appellant had in all cases given notice of its copyright by inscribing upon some visible portion of each of the several copies of every edition published by it of its copyrighted painting, or of the substance on which such copies were mounted, the following words, viz:

"Copyright 1905 by Louis Dejonge & Co."

199 Fifth. In construing the statutes relating to copyright literally, and in holding thereupon that the decree of the Circuit Court dismissing the bill of complaint should be affirmed for want of a sufficient copyright notice.

Sixth. In failing to adjudge and decree that the decree of the Circuit Court should be reversed with directions to enter a decree for appellant, and finding that the appellant's copyright was good and valid in law and that the appellee had in all respects infringed thereupon, and that the prayer of the appellant's bill of complaint for relief should in all things be granted.

Seventh. In failing to reasonably construe the copyright statutes with a view to effecting the purposes intended by Congress, and in so narrowly construing such statutes as to deprive appellant of the benefits intended to be conferred by Congress.

Wherefore, the said appellant prays the honorable Court to examine and correct the errors assigned and for a reversal of the decree of the United States Circuit Court of Appeals for the Third Circuit entered in the above-entitled cause.

(Signed)

SEWARD DAVIS,
Of Counsel for Appellant.

HOWSON & HOWSON,
Solicitors for Appellant.

Endorsed: No. 1521. Assignment of Errors. Received and Filed December 29, 1911. Saunders Lewis, Jr., Clerk.

200 Know all men by these presents, That we, Louis Dejonge and Company, and the National Surety Company, of the County and State of New York, are held and firmly bound unto Breuker and Kessler Company, in the sum of Five Hundred ($500) Dollars, to be paid to the said Breuker and Kessler Company, for which payment we well and truly bind ourselves and each of our successors and legal representatives, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 28th day of December, A. D., 1911.

Whereas the appellant in the above-entitled cause has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the Third Circuit on or about the 7th day of December, 1911.

Now, Therefore, the condition of this obligation is such that if the said appellant shall prosecute said appeal to effect and answer all damages and costs if it fails to make said appeal good, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) LOUIS DEJONGE & COMPANY,
By GERALD E. TERWILLIGER, [L. S.]
Attorney in Fact.

(Signed) NATIONAL SURETY COMPANY,
By CHAS. M. LLOYD, *Res. Vice-Pres.*

Attest:
DELMAH L. HARRIS,
Res. Asst. Sec.

[Seal National Surety Co.]

This bond approved December 28, 1911.
W. M. LANNING,
Circuit Judge.

Endorsed: No. 1521. Bond of Appeal. Received and Filed December 29, 1911. Saunders Lewis, Jr., Clerk.

201 The United States Circuit Court of Appeals, Third Circuit.

THE UNITED STATES OF AMERICA,
Third Circuit:

To the Breuker & Kessler Company:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court for the Third Circuit, wherein Louis Dejonge & Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William M. Lanning, Judge of the United States Circuit Court of Appeals for the Third Circuit, this 28th day of December, A. D., 1911.

(Signed) W. M. LANNING,
Judge of the United States Circuit Court of Appeals for the Third Circuit.

Endorsed: No. 1521. Citation. Received and Filed December 29, 1911. Saunders Lewis, Jr., Clerk.

202 In the United States Circuit Court of Appeals for the Third Circuit.

Acceptance of Service.

Due and timely service is hereby admitted of a copy of the within notice for appeal, petition for appeal, order allowing appeal, assignment of errors, bond on appeal, præcipe sur appeal, and due and timely service of the citation on appeal is hereby admitted this 29th day of December, 1911.

(Signed) FRANK S. BUSSER,
HARDING & HARDING,
Per FRANK S. BUSSER,
Solicitors for Appellee, Breuker & Kessler Co.

203 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, ss:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a Complete, true and faithful copy of the original transcript of record and proceedings in this Court, in the case of Louis Dejonge & Company vs. Brueker & Kessler Company, No. 1521, October Term, 1911, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this Fourth day of January in the year of our Lord one thousand nine hundred and Twelve and of the Independence of the United States the one hundred and Thirty-fifth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 23,015. U. S. Circuit Court of Appeals, 3d Circuit. Term No. 167. Louis Dejonge & Company, appellant, vs. Breuker & Kessler Company. Filed January 20th, 1912. File No. 23,015.

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Office Supreme Court, U. S.
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JAMES D. MAHER

Supreme Court of the United States.

LOUIS DE JONGE & COMPANY,
Complainant-Appellee,
against
BREUKER & KESSLER COMPANY,
Defendant-Appellee.

October Term, 1914.
No. 18.

BRIEF FOR APPELLANT.

SEWARD DAVIS,
Solicitor for Appellant,
1 LIBERTY STREET,
New York City.

WALTER F. THOMPSON,
CHARLES E. WILSON,
SEWARD DAVIS,
Of Counsel.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

INDEX.

PAGE

Statement of Case 1
Specification of Errors 2
Brief of the Argument 3
Point I.:
In an action in Equity under Sec. 4970, the provisions of Sec. 4962 are to be liberally construed 6
Point II.:
Sec. 4962, when reasonably construed, requires only substantial compliance as to notice 11
Point III.:
First: Complainant's notice complied substantially with the statutory requirement 13
Second: Complainant's marking complies with the trade custom 13
Third: The requirement of separate marking of each integer of complainant's multiple copy is literal and unreasonable 14
Fourth: In considering the requirement of the statute it should be construed having in view the character of the property intended to be protected. 15
Point IV:
First: If the copy be marked with the statutory notice by the proprietor, subsequent removal of the mark does not affect the copyright 16
Second: The use to which the reproduction may be put does not affect the copyright 17
Point V:
First: The copyright notice was sufficient 18
Second: It is inequitable to hold a copyright invalid against one not claiming to have been deceived or misled 22
Point VI:
The painting was copyrightable as such 23
Point VII:
The defendant has infringed 24
Point VIII:
Under the exceptional facts peculiar to this case, the court erred in dismissing the bill 27

Supreme Court of the United States.

LOUIS DEJONGE & COMPANY,
Complainant-Appellant,

AGAINST

BREUKER & KESSLER COMPANY,
Defendant-Appellee.

October Term, 1914.
No. 18.

Statement of the Case.

This is an appeal from a decree of the Circuit Court of Appeals for the Third Circuit affirming a decree in Equity dismissing the bill of complaint of Louis Dejonge & Company, here appellant, a corporation of New York, exhibited against Breuker & Kessler Company, here appellee, a corporation of Pennsylvania, which bill alleges infringement of a copyright for a painting and prays an injunction and accounting of profits.

The action was brought in the United States Circuit Court for the Eastern District of Pennsylvania, in Equity, on August 17, 1906, under Section 4970 of the Revised Statutes for violation of the rights secured complainant by Section 4952 of copyright in its painting.

The defense sustained was the alleged failure of complainant to comply with the requirements of Section 4962, prescribing the marking of each copy of a copyrighted painting with the statutory notice, as a condition precedent to maintaining an action for infringement.

Those sections of the Revised Statutes here involved, constituting the Copyright Act in force before July 1, 1909, are: Sec. 4952, governing the conditions precedent; Sec. 4962, gov-

erning notice by marking ; and Sec. 4970, governing an action in equity for infringement.

The opinion of his Honor, Judge McPherson, found at page 108 of the printed record, and reported in 182 Fed. Rep. at page 150, found for complainant upon all issues raised by the defenses, except that complainant had not duly marked each separate copy.

The Court of Appeals, whose opinion is found at page 116 of the record, as reported in 191 Fed. Rep., 35, 111 C. C. A., 567, held :

> "The decree dismissing the bill is affirmed for want of a sufficient copyright notice."

Specification of Errors.

The appellant's assignments of error are found at pages 120 and 121 of the Record, as follows :

First. In affirming the decree of the Circuit Court dismissing appellant's bill of complaint.

Second. In holding that the statutory conditions precedent to the investiture of the right to protection under the copyright law had not been complied with by appellant.

Third. In holding that the appellant had failed to give due notice of its copyright in accordance with the provisions of the United States Revised Statutes in such case made and provided, to-wit, the Act of June 18, 1874, Chapter 301 (18 U. S. Statutes at Large, 78).

Fourth. In refusing to hold, adjudge and decree that the appellant had in all cases given notice of its copyright by inscribing upon some visible portion of each of the several copies of every edition published by it of its copyrighted painting, or of the substance on which such copies were mounted, the following words, viz. :

> "Copyright 1905 by Louis Dejonge & Co."

Fifth. In construing the statutes relating to copyright literally, and in holding thereupon that the decree of the Circuit Court dismissing the bill of complaint should be affirmed for want of a sufficient copyright notice.

SIXTH. In failing to adjudge and decree that the decree of the Circuit Court should be reversed with directions to enter a decree for appellant, and finding that the appellant's copyright was good and valid in law and that the appellee had in all respects infringed thereupon, and that the prayer of the appellant's bill of complaint for relief should in all things be granted.

SEVENTH. In failing to reasonably construe the copyright statutes with a view to effecting the purposes intended by Congress, and in so narrowly construing such statutes as to deprive appellant of the benefits intended to be conferred by Congress.

BRIEF OF THE ARGUMENT.

The assignment of errors raises the main issue whether defendant has sustained its affirmative defense of complainant's alleged failure to mark the copies published by it, as prescribed by Section 4962, precluding complainant from maintaining this action. This being an affirmative defense, the burden of proof is upon the defendant.

The facts admitted as to the publication by complainant of copies of its copyrighted painting are that complainant printed, published and sold the lithographic sheet here in evidence as "Defendant's Exhibit, Sheet of Complainant's Box Paper No. 1" (Record, page 102), this and each sheet published bearing on its front at the lower left edge, the prescribed statutory notice: "Copyright 1905 by Louis DeJonge & Co" (R., p. 48, Qs. 17 and 18; p. 57, Q. 8; p. 69, Q. 20). On inspection of this exhibit the Court will perceive that it consists of a single sheet of paper upon which is lithographed a multiple copy of complainant's painting, the margin, or mount, bearing the copyright notice. This sheet is described in the opinion of the Circuit Court as follows:

> "In the present case the plaintiff did not attempt to reproduce the painting separately in order to sell his copies in that form. On the contrary, twelve complete copies were lithographed and printed upon one sheet, the picture having been so printed that *each copy would*

> *join harmoniously with its neighbors*, and the repeated design would thus produce a pleasing decorative effect. But there were twelve reproductions of the painting, while the sheet was marked in only one place with the notice required by law " (Record, p. 111).

The copy of complainant's painting is repeated twelve times, a combination of inseparable copies, each joined harmoniously with its neighbors, blending into one integral production. The lower court's conclusion was that as each of these separate integers of this production was a copy, each should bear a separate notice, and that the sheet should consequently bear on its face eleven additional separate and distinct imprints of the copyright notice beside the single notice printed upon this one sheet.

Supporting this contention, the Circuit Court said:

> " The copyright could only protect the reproductions if each separate copy should be marked, and as this was not done the statutory protection was vitiated."

Complainant urged that so to mark each copy would deface the sheet and spoil its artistic beauty; that a notice on the mount common to all was as efficacious, as a notice, as twelve notices upon the common mount could possibly be; and that to require numerical equality of copies and notices was, under the exceptional circumstances, purely technical, no useful purpose being attained by such multiplication. In sustaining defendant's contention which, under the facts here present, amounts to an unreasonable, narrow, and unnecessarily technical interpretation of the statutory requirement, the Courts reached a conclusion which is not in accordance with the policy of the law and which effects a forfeiture of complainant's right of protection under the statute.

Giving the statute, not a liberal, but only that fair and reasonable rendering which the courts have held to be its proper interpretation, it is respectfully submitted that this Court can best appreciate from an inspection of the exhibit itself the arbitrariness of such a construction as would require the printing upon this single sheet of twelve repetitions

of the statutory notice which it bears. No monitory purpose would be served by the mere multiplication of the notice. No purchaser of this sheet would be misled or deceived or fail to perceive from the notice given that the subject matter of the copy was copyrighted. There is no contention that the defendant or any one else has ever been deceived or misled or has failed to receive the due notice conveyed by the marking printed on each sheet. On the other hand, so to mark such reproductions would deface them and render the copies thus marred valueless both commercially and aesthetically, unless the marking were so minute as to be practically unnoticeable. A construction of the statute which penalizes complainant with forfeiture of its copyright for failure to repeat twelve times the printed notice given upon the single sheet containing the copy of its copyright work is believed to be unreasonable.

The constitution provides for the protection of authors, and the Copyright Act has been passed to carry this provision into effect. It provides for two classes of remedy for infringement of copyright: First, by an action at law for the recovery of a penalty and forfeiture, and Second, by an action in Equity for injunction and accounting for profits. This Act should be so construed as to effectuate its purpose. A construction of it which deprives it of force and effect upon the literal refinement of a technicality is repugnant to its spirit and sense. Such an interpretation as is here contended for is only resorted to where the proprietor of the copyright seeks to enforce *forfeiture* under those highly penal provisions of Sec. 4965 of the statutes inflicting a penalty and forfeiture upon the infringer for violation of the copyright; such interpretation, however, is avoided by the courts if possible where the author seeks only *equitable* relief for infringement, the courts being careful to preserve to the author the protection intended to be afforded him. This distinction between the penal portions of the statute and the remedial portions is well recognized, and the interpretation to be placed upon the requirements of Section 4962 may well depend in some measure upon the nature of the remedy sought by the proprietor.

The statutes are beneficent and in an Equity action, not to be narrowly construed. The courts have only adopted a strict construction where the penal provisions are sought to be en-

forced. Where the remedial and equitable statutes are invoked, they are to be liberally construed. The requirement of Section 4962, of marking copies of the copyrighted article as condition precedent to maintain a suit under either branch of the relief afforded is, therefore, to be construed liberally, unless a penalty is sought. Here only the equitable relief afforded by the act is prayed.

POINT I.

In an action in Equity under Section 4970 the provisions of Section 4962 are to be liberally construed.

Those Sections of the United States Revised Statutes so far as relevant, are as follows :

> SECTION 4962. " That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or on the page immediately following, if it be a book ; or if a map, chart, musical composition, print, cut, engraving, photograph, *painting*, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing *upon some visible portion thereof*, or *of the substance on which the same shall be mounted*, the following words, viz.:
>
> " ' Entered according to act of Congress, in the year , by A. B., in the office of the Librarian of Congress, at Washington ' ; or, at his option, the word ' Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out ; thus ' Copyright, 18 , by A. B.' "

(as amended by Act of June 18, 1874, Chapter 301 ; 18 U. S. Statutes at Large, 78.)

Section 4970 is as follows :

> " The circuit courts, and district courts having the jurisdiction of circuit courts, shall have power, upon bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violation of any rights secured by the laws respecting copyrights, *according to the course and principles of courts of equity*, on such terms as the court may deem reasonable."

These statutes were adopted pursuant to the authority vested in Congress by the Constitution to enact laws to promote the progress of science and the useful arts by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries. Article 1, Section 8 of the Federal Constitution.

" Under this grant of authority a series of statutes have been passed, having for their object the protection of the property which the author has in the right to publish his production, *the purpose of the statute being to protect this right* in such manner that the author may have the benefit of this property for a limited term of years. *These statutes should be given a fair and reasonable construction with a view to effecting such purpose.*"

> American Tobacco Co. vs. Werckmeister, 207 U. S., 284, at 291.

The Court in this case further say :

" Looking to the statute " (Section 4962), " it is apparent that, *if read literally*, the words ' inscribed on some visible part thereof,' etc., apply to the antecedent terms ' maps, charts, musical compositions, print, cut, engraving, photograph, painting,' etc., and the words of the first part of the sentence requiring notice to be inserted in the several copies of every edition published apply literally to the title page or the page immediately following, if it be a book.

But in construing a statute we are *not* always *confined to a literal reading*, and may consider its *object* and *purpose*, the *things with which it is dealing*, and the condition of affairs which led to its enactment *so as to effectuate rather than destroy* the spirit and force of the law which the legislature intended to enact " (*Id.*, p. 293).

In Bobbs-Merrill vs. Straus, 210 U. S., 337, the Court say:

At page 346: "The copyright statutes ought to be *reasonably construed* with a view to *effecting the purposes intended by Congress.* They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor so *narrowly construed as to deprive those* entitled to their benefits of the rights Congress intended to grant."

At page 347: "This fact is emphasized when we note the title to the Act of Congress, passed at its first session, '*An Act for the encouragement of learning,* by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned' (1 Stat. at Large, by Peters, Chap. 15, page 124)."

At page 348: "Each and all of these statutory rights should be given such protection as the act of Congress requires, in order to secure the rights conferred upon authors and others entitled to the benefit of the act."

At page 349:

"Section 4965 undertakes to work a forfeiture of copyrighted articles, and confers a right of action for a penalty * * * (Werkmeister v. American Tobacco Co., 207 U. S., 375). *As this is a suit in Equity for relief under Sec. 4970* of the U. S. Revised Statutes, giving to the Circuit and District Courts of the United States the right to grant relief by injunctions to prevent the violations of rights secured by the copyright statutes, *we are not concerned with rights and remedies under Sec. 4965.*"

In Globe Newspaper Co. vs. Walker, 210 U. S., 356, reversing the Court of Appeals for the First Circuit, in 140 Fed. Rep., 305, Mr. Justice DAY discusses the Copyright Act, saying, at page 365:

"Looking to the copyright statutes, we find a comprehensive system of rights and remedies provided."

And at page 367:

"Section 4970 provides for injunctions in copyright cases in the Circuit and District Courts of the United States, by bill in equity, to prevent the violation of any rights secured by the laws respecting copyrights, according to the course and principles of courts of equity, on such terms as the Court may deem reasonable.

"We think these statutes, taken together, indicate the purpose of Congress to provide a system of remedies to enforce the rights which have been granted to those who shall avail themselves of the statutes of the United States, and, in accordance therewith, become the owners of the exclusive right for a limited term to publish and multiply the copyrighted work."

In Myers vs. Callaghan, 5 Fed., 726, at 732, Judge DRUMMOND long ago said :

> "It seems to me, on the contrary, that these various provisions of law in relation to copyright should *have a liberal construction*, in order to give effect to what may be considered the inherent right of the author to his own work."

This case was affirmed in the Supreme Court, 128 U. S., 617.

Judge JENKINS, in Holmes vs. Donohue, 77 Fed., 179, at page 180, said :

> "I agree that all provisions of this law which may be deemed directory and *subsequent to the deposit* of the title are to be *very liberally construed* to protect the author in the right which he has sought to acquire."

In Werckmeister vs. American Lithographic Company, 142 Fed., 827, Judge HOLT, at page 831, said :

> "The object of the copyright law *is beneficient.* It was intended in the language of the constitution 'to promote the progress of science and the useful arts' and, in my opinion, *the copyright laws should be liberally construed* to carry out the intention of the constitution."

This case was affirmed in the Court of Appeals, 146 F. R., 377, and by the Supreme Court, 207 U. S., 284.

In Harper Bros. vs. Donohue, 144 Fed. Rep., 491, Judge SANBORN, at page 496, said :

> " The provisions of the copyright law are to be *broadly and liberally construed* to insure to the author the product of his brain."

In Ford vs. Charles E. Blaney Amusement Co., 148 Fed. Rep., 642, Judge HOLT, at page 644, said :

> " The copyright act, in my opinion, should be *liberally construed* with a view to protect the just rights of authors and to encourage literature and art."

This language of Judge HOLT was quoted with approval in Dam vs. Kirk La Shelle Co., 175 Fed. Rep., 902, by the Circuit Court of Appeals for the Second Circuit, Judge NOYES, at page 906, adding :

> " The copyright law should receive a *reasonable* construction."

See, also,

Bolles vs. Outing Co., 175 U. S., 262.
Mifflin vs. R. H. White & Co., 190 U. S., 260, at 264.

As said by Judge DALLAS in Edison vs. Lubin, 119 Fed. Rep., 993 :

> " I do not question the correctness of the general proposition that the *remedial sections* of a statute may be *liberally construed*, although it contain *penal provisions* which must be construed *strictly*."

While the Court of Appeals reversed Judge DALLAS in this case, such reversal was an affirmance of this general proposition (122 Fed. Rep., 240).

It is submitted that the interpretation adopted by the lower Court was not liberal nor even reasonable, but was extremely technical, and contrary to the construction this Court has uniformly placed upon this section.

POINT II.

Section 4962 when reasonably construed requires only substantial compliance as to notice.

The defendant, in its brief in the Circuit Court, contended that *Section 4962* is a *penal statute*, and must therefore be strictly interpreted, saying:

"Complainant attempts to overcome the positive requirements of the law by producing testimony to the effect that the paper containing the twelve copies of the design would be rendered more or less *valueless* and *unsaleable* if the copyright mark were placed on each copy. *This may be*, but the requirement of the statute is positive. Moreover, the statute is *a penal statute* and must therefore be *strictly interpreted*. Considerations of business expediency cannot excuse a literal compliance with the requirement of the act."

The Court in its decision followed this erroneous statement of defendant's brief, saying that the express requirements of the statute must be strictly obeyed, and the Court of Appeals followed the Circuit Court.

The only sections of the copyright statutes which the courts have held must be literally obeyed are those by which the copyright is obtained, governing the deposit of copies prior to publication (Holmes vs. Donohue, *supra*), and those statutes which authorize the proprietor of the copyright to recover a penalty and inflict a forfeiture for violation of his right.

Sections 4964 and 4965 grant this redress and have been held to be penal statutes.

Schriver vs. Sharpless, 6 Fed. Rep., 175, 179.
Same Case, 110 U. S., 76.
McDonald vs. Hearst, 95 Fed. Rep., 656.
Taylor vs. Gilman, 24 Fed. Rep., 634.
Wheeler vs. Cobby, 70 Fed. Rep., 487.
Walker vs. Globe Newspaper Co., 140 Fed. Rep., 305, 308.

In Werckmeister vs. American Tobacco Co., 207 U. S., 375, at 383, speaking of Section 4965, which is quoted, the Court say:

"This section of the statute is highly penal."

It is believed that, under the authorities cited, the contention that Section 4962 is a penal statute is erroneous, and that "a substantial compliance" with its terms "is all that is necessary," as stated in

Snow vs. Mast, 65 Fed., 995.

That a substantial compliance with the requirement is all that is necessary, see

Bolles vs. Outing Co., 175 U. S., 262.
Miffln vs. R. H. White & Co., 190 U. S., 260, at 264.
Callaghan vs. Myers, 128 U. S., 617.
Falk vs. Schumacher, 48 Fed. Rep., 222.
Blume vs. Spear, 30 Fed. Rep., 629.
Werckmeister vs. Springer Lithographing Co., 63 Fed. Rep., 808.
Falk vs. Gast Lithograph and Engraving Co., 54 Fed. Rep., 890.
Hilles & Co. vs. Austrich, 120 Fed. Rep., 862.

American and English Encyclopædia of Law, Vol. VII., at page 555:

"The object of the provision requiring the notice of copyright is to inform the public of the existence of a copyright, the time of its commencement and by whom claimed. A *substantial compliance* with the terms of the provision is all that is necessary."

Defendant admits that if the notice were placed on each copy, the sheet containing them would be valueless and unsaleable *(supra)*.

The statute is broad in its purpose, broad in its scope, and should be given corresponding breadth in its construction.

Such compliance with its requirements as would defeat its purpose cannot be deemed reasonable.

POINT III.

FIRST. Complainant's notice complied substantially with the statutory requirements.

The purpose intended by Section 4962 is to give notice of the copyright to the public.

Burrow-Giles Co. vs. Sarony, 111 U. S., 53, 55 and 56.

The public is the *persons who buy or deal with the published thing.*

In American Tobacco Co. vs. Werckmeister, 207 U. S., 284, at 294, the Court held :

> " The purpose and object of the act * * * is to give notice of the copyright to the public—that is, to the *persons who buy or deal with the published thing.*"

Here the public—purchaser of complainant's sheets—is the dealer in paper. They testify such notice is customary and brings home to them the fact of copyright (Record, pp. 40, Q. 7 ; 41, Q. 9 ; 42, Q. 9 ; 43, Qs. 10 and 11 ; 45, Q. 16 ; 47, Qs. 6, 7 and 48, Q. 8).

See Point V. for discussion of sufficiency.

SECOND. Complainant's marking complies with the trade custom.

The copyright law provides that in certain cases notice may be put upon the back, as of tiles or placques, etc., " or in such other place upon them as has heretofore been usual for manufacturers of such articles to employ for the placing of manufacturers, merchants, and trade-marks thereon " (22 Stat. at Large, 181).

This section illustrates the policy in accordance with which the statute requiring marking is framed.

The evidence shows it to be the custom to place the statutory imprint upon lithographic sheets in the form used by complainant (Record, p. 42, Q. 8 ; p. 43, Qs. 9, 10 and 11 ; p.

67, Qs. 10 and 11). The exhibits in evidence show this to be the custom (Record, p. 43; "Complt's Exhibit Sundry Sheets"). The witnesses testified that it is not possible to mark the sheets upon their face, as it would destroy their value, because they would not be saleable (*post* under Third.).

> "The notice prescribed by the Act of Congress is to protect the public from charges of piracy, and it should be placed *where it will reasonably accomplish its object*, having regard to the *character of the article* and the *customs of trade*."
>
> Knotts vs. Va. Car Co., 204 Fed., 926.

THIRD. The requirement of separate marking of each integer of complainant's multiple copy is literal and unreasonable, because it would render the reproductions valueless.

Many witnesses testified that a sheet having each copy marked with a notice would be valueless (R., p. 40, Q. 5; p. 41, Q. 6; p. 42, Q. 7; p. 44, Q. 7; p. 67, Qs. 5, 6, 7).

The Court will not require "impossible diligence."

In Edison vs. Lubin, 122 Fed. Rep., 240, the Court of Appeals overruled the holding of Judge DALLAS in Edison vs. Lubin, 119 Fed. Rep., 993. Judge DALLAS had held that Section 4952 of the Revised Statutes did not extend the copyright system to an "aggregation of photographs," saying:

> "I think that to acquire the monopoly it confers it is requisite that every photograph, no matter how or for what purpose it may be conjoined with others, shall be separately registered and that the *prescribed notice of copyright shall be inscribed upon each of them*."

At page 241, Judge BUFFINGTON, speaking for the Court of Appeals, writes:

> "The complainant thereafter placed on the copies thereof issued by him a notice of copyright inscribed on a celluloid plate fastened on the front and at one end of the sheet."

And at page 243 it was held :

> " We are also of opinion the sheet was duly marked, for it was such as ' to give notice of the copyright to the public by placing upon *each copy* in some visible shape the name of the author, the existence of the claim to exclusive right, and the date at which this right was obtained,' which in Burrow-Giles Co. vs. Sarony, 111 U. S., 755, was said to be the object of the statute " (page 755 is error for pages 53, 55).

FOURTH : In Considering the Requirement of the Statute it Should be Construed Having in View the Character of the Property Intended to be Protected.

" The purpose of the copyright statute is not so much to protect the physical thing created as to protect the right of publication and reproduction, and the statute should be construed *in view of the character of the property* intended to be protected." Syllabus, American Tobacco Co. vs. Werckmeister, 207 U. S., 284.

So here, the character of the thing to be marked being considered, the fact that to mark each separate element of the composite copy would so deface it and mar it as to make it worthless is to be taken into account (Record, pp. 40, Q. 5 ; 41, Q. 6 ; 42, Q. 7 ; 44, Q. 7 ; 67, Qs. 5 and 6).

To require a marking that destroys is unreasonable.

In re Pingree-Tranny Co., 197 O. G., 997, Commissioner Ewing.

Knotts vs. Va. Car Co. *(supra)*.

As in stereoscopic photographs, of which the Court may take notice judicially, two identical pictures are placed side by side upon a common mount bearing a single copyright notice, the law is satisfied, because its object is indisputably attained. But there are two copies, and only one notice. The arithmetical rule is plainly hypertechnical.

POINT IV.

FIRST: If the copy be marked with the statutory notice by the proprietor, subsequent removal of the mark does not affect the copyright.

Defendant contended that the use by the box-maker of complainant's sheets necessarily resulted in the cutting of the sheet, and the separation of the notice from the copy. But the box-purchaser is not the public as to complainant; as to him, the box-maker who buys the sheet with the notice upon it is the public to be notified, and he is duly and sufficiently warned by the notice upon each sheet. What he may do in removing the notice is immaterial and cannot prejudice the publisher.

In Falk vs. Gast Lithograph & Engraving Co., 48 Fed. Rep., 262, an action in equity for injunction to enjoin infringement of a copyright for photograph, COXE, J., said:

> "The following are the principal defenses:
>
> "FIRST: The complainant failed to inscribe upon each copy of the photograph in question the notice required by law, the photograph copied by the defendant being without such notice. * * *
>
> "The testimony relating to the first defense should be scrutinized with unusual care, for the reason that the value of copyrights will be greatly impaired if such defenses are encouraged."

At page 263:

> "In other words, it is not enough to say that the photograph was without the statutory notice when it entered the defendant's possession. It must appear that it was without the notice when it left the complainant's possession. There is no evidence to show this. *If copied afterward or put upon a new mount, the complainant should not suffer.*"

In Falk vs. Gast Lithograph & Engraving Co., 54 Fed. Rep., 890, the Court of Appeals for the Second Circuit, by Judge SHIPMAN, ruling in affirmance of Judge COXE's decision, at page 893, says:

> "*If the proper statutory notice of copyright was upon each copy as it left the control and ownership of the proprietor of the copyright, he cannot be responsible for any changes which were afterwards improvidently made upon a particular copy before it came into the hands of the last purchaser.*"

In Edison vs. Lubin, 122 Fed. Rep., 240, the defendant had secured a part of one of the positive films from which the copyright notice had been detached, and had no knowledge that it had been copyrighted. He was nevertheless enjoined.

SECOND: The use to which the reproduction of a copyright may be put does not affect the copyright.

Defendant has contended that because the complainant has multiplied the copies of its painting for commercial uses, the copyright in its inception was void because the painting was produced as a work of art to be so copied.

In Falk vs. Donaldson, 57 Fed. Rep., 32, at page 36, Judge TOWNSEND, in an action in equity for infringement of copyright, held:

> "The measure of complainant's rights is not limited by the mere fact that the lithograph would not displace the photograph in the market. He is *entitled to any lawful use of this property whereby he may get a profit out of it.* It is not a question of the extent of damages, but of *violation of rights.*"

This subject would not seem to require further discussion. It was the groundwork of the main defense in the lower Court, and it was disposed of in the opinion of his Honor Judge MCPHERSON favorably to complainant upon the authority of

Yuengling vs. Schile, 12 Fed. Rep., 97, and Schumacher vs. Schwencke, 25 Fed. Rep., 466.

The language of Judge COXE in the latter case, quoted in the decision below, is particularly pertinent.

If the painting sought to be copyrighted is a work of the fine arts, reproductions of it adapted and intended to serve any useful end, as by lithographed copies for use as in the case at bar, in covering boxes, or as book-covers or for wrapping packages (Record, p. 80, Q. 5; p. 15, Q. 13; p. 21, Q. 18 and p. 44, Q. 10), is legitimate, and does not conflict with the intent of the law to protect the author or proprietor of the copyright in its exclusive production.

In Bleistein vs. Donaldson Lithographic Co., 188 U. S. 239, the Court say:

> "A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement."

POINT V.

FIRST. The copyright notice was sufficient.

In Edison vs. Lubin, 119 Fed. Rep., 993, which was an action in equity for infringement of copyright on a strip containing 4,500 small pictures, Judge DALLAS held that Section 4952 of the Revised Statutes did not extend the copyright system to "an aggregation of photographs," saying:

> "I think that, to acquire the monopoly it confers, it is requisite that every photograph, no matter how or for what purpose it may be conjoined with others, shall be separately registered, and that the *prescribed notice of copyright shall be inscribed upon each of them.*"

In this case the sensitized celluloid film contained 4,500 pictures. The part thereof reproduced by Lubin contained 1,500 pictures. Such reproduction was made by him without knowledge of copyright, the notice having been detached therefrom. This notice was a *single notice at the end* of the film.

The decree of the Court below was reversed, with directions to enter a decree for the complainant.

In its opinion reversing the Court below, the Court of Appeals held, 122 Fed., 240, at page 241 :

> "To require each of numerous undistinguishable pictures to be individually copyrighted, as suggested by the Court, would, in effect, be to require copyright of many pictures to protect a single one. * * * What was thus copyrighted was a single celluloid sheet on which a number of objects had been photographically printed or reproduced. * * * The mere circumstance that such positive is pictured on a strip of celluloid, and not on a strip of paper, is immaterial. * * * To say that the continuous method by which this negative was secured was unknown when the act was passed and therefore a photograph of it was not covered by the act is to beg the question. Such construction is at variance with the object of the act, which was passed to further the constitutional grant of power 'to promote the progress of science and useful arts.' When Congress, in recognition of the photographic art saw fit, in 1865, to amend the act of 1831 (13 Stat., 540), and extend copyright protection to a photograph or negative, it is not to be presumed it thought such art could not progress and that no protection was to be afforded such progress. It must have recognized there would be change and advance in making photographs, just as there has been in making books, printing chromos, and other subjects of copyright protection. * * * From the standpoint of preparatory work in securing the negative, the latter consists of a number of different views, but when the negative was secured the article reproduced therefrom was a single photograph of the whole. And

that it is, in substance, a single photograph, is shown by the fact that its value consists in its protection as a whole or unit, and the injury to copyright protection consists not in pirating one picture, but in appropriating it in its entirety."

Earlier, at page 241, the Court say:

> "The complainant thereafter placed on the copies thereof issued by him a notice of copyright inscribed on a celluloid plate fastened on the front and at one end of the sheet. From the other end of one of such marked articles about one-third thereof was detached by some unknown person and came into the hands of respondent, without knowledge on his part of its having been copyrighted."

At page 243 the Court said:

> "We are also of opinion the sheet was *duly marked*, for it was such as 'to give notice of the copyright to the public by placing upon each copy in some visible shape the name of the author, the existence of the claim to exclusive right, and the date at which this right was obtained,' which in Burrow-Giles Co. vs. Sarony, 111 U. S., 755' (111 U. S., 53) 'was said to be the object of the statute.'"

This decision has been followed by the Court of Appeals for the Second Circuit, in Harper & Bros. vs. Kalem Co., 169 Fed. Rep., 61. The Court held a moving picture film or photograph to constitute a single picture capable of copyright as such and that the series of pictures contained on the film was duly marked by a single notice. The final decree granting perpetual injunction was affirmed, the Court saying, at page 63, by WARD, C. J.:

> "The series of photographs taken by the defendant constitutes a single picture capable of copyright as such (Edison vs. Lubin, 122 Fed., 240; American Mutoscope Co. vs. Edison, 137 Fed., 262)."

In the former case, the photographs each differ slightly from those adjacent, but all constitute a single scene or subject. In this later case, the photographs were taken at different points, presenting different views, hence the photographs present subjects that differ. Yet one marking was held sufficient for the many.

In America Mutoscope and Biograph Co. vs. Edison Mfg. Co., 137 Fed. Rep., 262, Judge LANNING, reviews Edison vs. Lubin and follows its holdings, saying, at page 266, that "a series of pictures telling a single story," may be copyrighted as a photograph, with the necessary corollary that a single marking of all is sufficient notice of their copyright.

From these cases, it is submitted, the rule may be deduced that a *fair and reasonable construction to effect the purpose of Section 4962, permits a single marking of many units if they are so inter-related as to constitute an integral representation and are upon a common mount.*

Here the complainant's sheet presents identical reproductions of the painting, which, furthermore, are so inter-related and blended as to be inseparable and "telling a single story."

Under these authorities, had complainant photographed its copyrighted painting with a motion picture camera and produced a film strip containing a thousand copies of it, *one notice at the bottom of the strip would have sufficed.*

In the film cases, the defendant was misled, as the notice was at the end of a sheet 300 feet in length, containing 4,500 pictures, a part of which came into defendant's possession unmarked; he was, nevertheless, enjoined. Here the defendant was not misled, nor could he be.

Had the copyrighted painting been itself a combination of twelve identical units, the copy would be marked but once, and we would then have the precise thing here in evidence as an exhibit. Such marking would be a literal compliance, beyond question, with the statute. Can it be seriously urged that the same notice upon the same thing is inadequate to give the same information to the same public?

SECOND: It is inequitable to hold a copyright invalid against one not claiming to have been deceived or misled.

In Black vs. Henry G. Allen Co., 65 Fed. Rep., 764, Judge TOWNSEND held that the copyright was not invalid as against one not claiming to have been "*deceived* or *misled*."

In Hilles & Co. vs. Hoover, 136 Fed. Rep., 701, in a suit in equity for infringement of copyright, Judge HOLLAND said:

> "I am not convinced from the evidence in this case that the copies from which defendants had their alleged infringing copies made contained the word 'published' in the notice of the plaintiff's copyright; but, even if the notice did contain the word 'published,' the *defendants were not misled or deceived.* It was a deliberate act on their part to copy the plaintiff's paintings, and they did it with ample and legal notice of the fact that the paintings were copyrighted by the plaintiff."

In Callaghan vs. Myers, 128 U. S., 617, the title of a book was deposited in 1867, while the notice of copyright gave the year as 1866. The notice of copyright gave the name of "E. B. Myers," while the title deposited gave the name "E. B. Myers and Chandler." These variances were held to be immaterial, and the statute was said to be

> "Substantially complied with, and particularly as it is not shown that the defendants were *misled* by the variance, or induced to do or omit anything because of it."

POINT VI.

The painting was copyrightable as such.

As to the copyrighted picture, the Court below, sustaining the finding above stated, said :

> " It clearly appears that the painting now in question is artistic in thought and execution, and it was therefore entitled to protection by a copyright. * * * " (Record, p. 108.)

That a painting, if artistic, is copyrightable, see
Bleistein vs. Donaldson Lithographic Co., 188 U. S., 239, and cases cited.

The painting being thus a proper subject of copyright and there being no contention that complainant did not take the steps and comply with the formalities prescribed by the statute for the obtaining of copyright protection, it follows that a valid copyright of the painting vested in complainant.

The view of the court at circuit, that this picture was a work of art, was corroborated by the testimony of plaintiff's witnesses the eminent artists Frank Vincent DuMond (Record, p. 13) and Will H. Low (Record, p. 20). Defendant offered no testimony to the contrary, but spent much time in endeavoring to show that this painting was intended for a design and that its artistic merits were thereby destroyed. Plaintiff's witnesses DuMond (pages 17 and 18) and Low (page 23) testify that a painting so executed as to be used as a design is not for such reason any the less a work of art. The witness Low (page 23) testifies :

> " I have frequently seen such designs executed in a variety of materials, but quite often in water color, and I should say that such designs, assuming that they possessed artistic merit, were to be considered works of art, and in point of fact have been so considered, notably by the International jury of the Louisiana Purcease Exposition, St. Louis, 1904."

POINT VII.

Defendant has infringed.

As to infringement: The defendant admits the publication of the lithographic sheet marked in evidence "Complainant's Exhibit, Defendant's Product" (Record, p. 23), and the answer admits the publication and sale of sheets like "Complainant's Exhibit C" (Record, p. 124). The opinion of Judge McPherson assumes infringement (Record, p. 108). This finding is supported by the testimony of five witnesses, who, upon comparison of defendant's product with complainant's copyright painting, testified that the two are substantially identical, and that the defendant's product is merely a variation of the main design of complainant's painting (R., pp. 14; 20; 37, Q. 15; 39, Q. 9; 46, Q. 14).

On this point the appellee's witnesses either testified generally that "there is no similarity", or that "there is no comparison", or else devoted themselves to showing differences in detail which can be of little use on a question of appearance. "Appearances of design are to be judged by synthetic observation rather than by analytic inspection" (Walker on Patents, Section 375).

> "* * * what is the true test of identity of design? Plainly it must be sameness of appearance."
>
> Gorham Mfg. Co. vs. White, 81 U. S., 511.

> "The eye of an artist or connoisseur will, no doubt, find differences between these two photographs. * * * But the identities are much greater than the differences, and it seems to us that the artist was careful to introduce only enough differences to argue about, while undertaking to make what would seem to be a copy to the ordinary purchaser who did not have both photographs before him at the same time."
>
> Gross vs. Seligman, 212 Fed., 930.

The copies admittedly printed and published by defendant (R., p. 16) are before the Court with the copyrighted painting.

The similarity is obvious. Complainant's witnesses, Will H. Low and Frank Vincent Du Mond, artists of high repute, specially point out that the defendant's copy embodies the substantial and material parts of the painting (Record, pp. 14, Qs. 11 and 12 ; and 20, Qs. 13 and 14).

In Falk vs. Donaldson, 57 Fed. Rep., 32, an action in equity for infringement of copyright, Judge TOWNSEND, at page 35, said :

> " But the real question is not one as to admission of fact, but whether the lithograph is an illegal appropriation of the *substantial* parts of the photograph. In such a case the inquiry always is whether the alleged infringer has appropriated the *results* of the original conception of the artist. It is not a question of quantity, but of *quality and value;* not whether the part appropriated is a literal copy of the original production, but whether it is a *substantial and material part.* The question is, to what is the artist or author entitled as his conception, and what of such original conception has been appropriated? Gray vs. Russell, 1 Story, 11 ; Folsom v. Marsh, 2 Story, 115 ; Drone, Copyr. 410."
> * * * " The question presented here is whether the defendants have so far copied the design of complainant as to appropriate his manifestation of his conception, or a *substantial* part thereof. The lithograph is not strictly a copy of the photograph. It differs from it in various ways. Some 40 differences have been suggested by experts introduced by defendants. Expert testimony in such a case has no greater weight than expert testimony upon the question of infringement. ' The test of sameness is determined by the eye of the ordinary observer ' (Gorham Co. v. White, 14 Wall., 528 ; Ripley v. Glass Co., 49 Fed. Rep., 927). But the testimony *is helpful* in suggesting and locating the differences, and it enables us to discover their general character ; and it seems to me that, taken together, they show mere differences of detail. The lithograph lacks the artistic excellencies of the photograph, but I cannot understand how the fact that an attempted appropriation has been in-

> artistically accomplished can help the infringer. If a painter originates and copyrights a work of art, can a chromo manufacturer copy the design to advertise the wares of a merchant and defend against an action on the ground that the mechanic has not caught the spirit of the artist, or mixed the pigments in the same tones of color?" (Citing Untermeyer vs. Freund, 37 Fed. Rep., 343; Falk vs. Gast Lithograph & Engraving Co., 48 Fed. Rep., 678; and Turner vs. Robinson, 10 Irish Chancery, 121, 510.)

Identity is a question of fact. If substantially identical, there is *prima facie* a presumption of infringement.

In Encyclopædia Britannica Co. vs. American Newspaper paper Association, 130 Fed. Rep., 460, Judge LANNING held, on motion for preliminary injunction in an action for infringement of copyright, on the subject of infringement, at page 464, as follows:

> "Substantial identity, or a striking resemblance between the work complained of and that for which protection is claimed, creates a *presumption of unlawful copying*, which must be overcome by the defendant. Drone on Copyright, pages 400, 430. And what amounts to *substantial identity is a question of fact*, to be determined in each case by a comparison of the two works (Drone on Copyright, p. 408; Emerson vs. Davies, 3 Story, 793, Fed. Cas. No. 4436; Lawrence vs. Dana, *supra*, Fed. Cas. No. 8136)."

This case was affirmed on appeal by the Court of Appeals for the Third Circuit, 134 Fed. Rep., 831.

The defendant has not overcome this presumption.

Complainant offered testimony of eminent artists in support of the obvious identity of the painting and defendant's copy, not as experts, but as men of known reputation and in addition defendant's witness Low testifies, as a matter of fact (R., p. 24, Q. 30), that he himself *was deceived* on first observing the defendant's pictures. The preponderance of evidence is clearly in favor of infringement (Record, p. 14, Qs. 11 and 12; p. 20, Q. 13; p. 33, Q. 26;

p. 37, Q. 15; p. 46, Q. 14). Where the Court has found a fact upon contradictory evidence, its conclusion will rarely be disturbed.

Foster's Federal Practice, 4th Ed., p. 2136, citing
Harding vs. Hart, 113 Fed, Rep., 304.
Kimberly vs. Arms, 129 U. S., 512.
Oteri vs. Scalzo, 145 U. S., 578, 589, 590.
Topliff vs. Topliff, 145 U. S., 156.

The bill prays for an accounting of gains and profits as well as injunction (Record, p. 5).

An accounting of profits is comprehended in the equitable relief afforded by Section 4970.

> "The appellant claims that a decree for an accounting is erroneous because the only pecuniary remedy which has been provided by statute for the author is an action at law for a forfeiture, and for a penalty. Section 4970 conferred upon Circuit Courts the power, upon bill in equity, to grant injunctions to prevent the violation of rights secured by the laws respecting copyrights. 'The right to an account of profits is incident to the right to an injunction in copy and patent right cases.' Stevens vs. Gladding, 17 How., 447; Belford vs. Scribner, 144 U. S., 488; 12 Sup. Ct. Rep., 734."
>
> Falk vs. Lithograph Co., 54 Fed. Rep., 890, at 894 (C. C. A. 2nd Circuit Judges WALLACE and SHIPMAN per Judge SHIPMAN).

POINT VIII.

Under the exceptional facts peculiar to this case, the Court erred in dismissing the Bill.

Applying the light of common sense to the peculiar facts of this case, it would seem that when the notice is once printed upon the substance on which the united copies appear, its force is common to all, to the nearest to it, and to the furthest from it. The requirement of arithmetical equality between the

number of copies and the number of notices has no base in reason. The one notice serves the function for which it was intended. A multiplicity of notices can inform the public not an iota more than the warning which a single notice gives the buyer of the sheet that copyrighted matter is present. In this case the more so by reason of the identity of the copies and their collocation. It serves the sole purpose of one notice or of twelve notices in that it puts the public on its guard by informing it of the restrictions to reproduction imposed.

The notice on the mount of every copy published by the appellant applied as it is to the complete harmonious combination, acts as a full notice to the entire matter on the sheet, being, so to say, "*per my et per tout*," for one and for all of the parts thereof.

The subject-matter, being a work of art, is entitled to the broadest protection and the notice having been affixed in compliance with the terms of the act, the principles of equity require the enjoining of the piratical imitation.

The decree below should be reversed with directions to enter a decree for injunction and an accounting of profits.

Respectfully submitted,
SEWARD DAVIS,
Solicitor for Complainant.

WALTER F. THOMPSON,
CHARLES E. WILSON,
SEWARD DAVIS,
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13

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IN THE

Supreme Court of the United States

No. 18. October Term, 1914.

(Originally October Term, 1913, No. 167.)

LOUIS DEJONGE & COMPANY,
Complainant-Appellant,

v.

BREUKER & KESSLER COMPANY,
Defendant-Appellee.

BRIEF FOR APPELLEE.

FRANK S. BUSSER,
Solicitor and of Counsel
for Appellee.

International, 236 Chestnut St.

INDEX.

	Page.
Nature of the Proceedings	1
Abstract of the Pleadings	1
Statement of the Case	2
Opinion of the Circuit Court	4
Opinion of the Circuit Court of Appeals	5
Statement of the Questions Involved	7
Argument:	
Complainant's Copyright Invalid, Because Published Copies Not Marked Copyright	8
Subject-matter Not Copyrightable	18
Subject-matter Not Copyrightable as a Painting	44
Complainant's Copyright Not Infringed	48
Conclusion	64
Appendix: Extracts From Copyright Law	65

Supreme Court of the United States.

Louis De Jonge & Company, Appellant, v. *Breuker & Kessler Company.*	October Term, 1914. No. 18.

BRIEF FOR DEFENDANT-APPELLEE.

Nature of the Proceedings.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Third Circuit affirming a decree of the United States Circuit Court for the Eastern District of Pennsylvania, dismissing the bill of complaint of Louis Dejonge & Company in a suit in equity against Breuker & Kessler Company to restrain an alleged infringement of an alleged copyrighted painting.

Abstract of the Pleadings.

The bill averred that the complainant (appellant) is the sole proprietor of a painting for which, on September 23, 1905, it obtained copyright protection by complying with all the requirements of the law; that "it has in all cases given notice of its said copyright by inscribing upon a visible portion of each one of the several copies of every edition published by it of the said painting" the words required by statute; and that defendant (appellee) produced, published, sold and exposed for sale, copies of said painting "either in whole or in part or by varying the main design." A sheet containing twelve copies of the alleged copyright painting

as published by appellant, was annexed to the bill and marked "Exhibit E." A sheet containing thirty-two copies of the alleged infringing design of appellee was annexed to the bill marked "Exhibit C."

The answer averred that the "alleged painting is not a painting in the sense of the copyright law, but is a design for an article of manufacture and was produced especially for covering boxes and as such is not within the purview of the Acts of Congress relating to copyrights"; that the proceedings in the office of the Librarian of Congress therefore gave it no valid copyright; that even if the said design were copyrightable, it was not copyrightable as a "painting"; and that the same being a design for an article of manufacture, it could be protected only under the Acts of Congress relating to new, original and ornamental designs for articles of manufacture.

Appellee also denied that appellant gave notice of its copyright by marking the copies published by it as alleged in the bill and as required by the copyright law, and expressly averred that appellant sold large numbers of said copies without any notice of copyright.

Appellee admitted that it applied a design the same as "Exhibit C" to box paper and sold and exposed to sale such box paper but denied that such design is a copy of appellant's alleged painting in whole or in part or a variation of the main design thereof. Appellant further averred that its design was patented October 9, 1906, as a design for box paper, said patent being numbered 38,281.

Statement of the Case.

The following are undisputed facts:

Before September 23, 1905, the complainant employed one George F. Muendel to produce a design for application, in repeat form, to box-covering paper—

concededly such an article of manufacture as is contemplated by the design patent laws. Such a design was produced. The original was painted, in accordance with the usual custom, in water colors. As is usual in repeat designs, the design was made with especial regard to the requirement that the top and bottom edges, and also the two side edges, should match or assimilate with each other, so that when reproduced in multiple, by lithographic processes, the repeats would merge into each other and form a design as a whole in which the indentity of the original would be substantially lost, thus permitting the box paper to be cut into any number of pieces on arbitrary lines determined by the size and shape of the box to be covered.

After the completion of the design for box paper as aforesaid, the same was, on or about September 23, 1905, *copyrighted* as a *painting*. The appellant reproduced the design, by lithographic processes, in repeat form, on sheets of paper, which were sold to the box trade by the appellant and employed for box-covering purposes.

Each copy of the design so produced and sold was not marked copyrighted, but a copyright mark was imprinted upon one only of the twelve copies of the design that the sheet contained.

Subsequently the appellee originated a design for box-covering paper, which was reproduced, by lithographic processes, in repeat form, on sheets of paper, each sheet containing thirty-two copies of the design. The said design was patented, the patent being numbered 38,281 and dated October 9, 1906.

Appellee's design was claimed by appellant to be an infringement upon its copyright, and in August, 1906, an action in replevin was brought for the recovery of the statutory penalty (ten dollars for every copy found in defendant's possession or by him sold or exposed for sale). Simultaneously a bill in equity was filed praying

for an injunction and an account and application was made for a preliminary injunction. The injunction motion was heard by his Honor Judge McPherson and denied. The Court, after stating that the chief defence seemed to be that "while the sketch in question may have been entitled to protection by a design patent . . . it was not the subject of a copyright," held that "the complainant's right is not clear enough, as the matter now stands, to justify the court in interfering with the defendant's business by summary process."

In October, 1910, the case came up for final hearing before his Honor Judge McPherson on full pleadings and proofs, and appellee urged the following four defenses:

That appellant's design is not a *painting*, but is a *design for an acticle of manufacture*, and as such cannot be protected by entry or registration in the *Copyright Office*, but should have been protected by means of a *design patent*, and the copyright is therefore invalid.

That even if appellant's design were not a *design for an article of manufacture*, but were a copyrightable work of the *fine arts*, it would not be copyrightable as a *painting*, but only as a *lithograph or chromo*, and the copyright is therefore invalid.

That even if appellant had originally a valid copyright, it is now invalid by reason of publication by appellant of copies *not marked* copyrighted.

That even if appellant's copyright were valid, it has *not been infringed* by appellee.

Opinion of the Circuit Court.

The first defense (that appellant's design for box paper is not a *painting* in the sense of the copyright law, but is a *design for an article of manufacture* in the sense of the design patent law, and therefore cannot be

lawfully protected by *copyright* but can only be *patented* as a design for an article of manufacture), was overruled by the Court. The Court also overruled appellant's contention that *both* modes of protection were available. Contrary to the contentions of both parties, the Court held that only *one* mode of protection was available, but that appellant could elect the form of protection it desired and would then be bound by its election.

The second defense above recited was not considered by the Court.

The third defense above recited (*failure to mark the several copies copyrighted*) was sustained by the Court and the bill was therefore dismissed.

The Court did not pass upon the fourth defense above enumerated (the question of infringement), but stated that "for present purposes infringement may be presumed."

Opinion of the Circuit Court of Appeals.

The same defenses were urged by appellee before the Circuit Court of Appeals. Inasmuch as this court agreed with the Circuit Court in upholding the third defense above recited—that the complainant had failed to observe the statutory requirement as to marking—it refrained from passing upon the other defenses above recited, but clearly indicated, by the following language, that its silence with respect thereto was not to be construed as an approval of the conclusion reached by the Circuit Court as to the first defense above recited (Rec., pp. 116, 117):

> "In this case the Circuit Court decided (182 Fed. 150) that a painting, if it possess artistic merit and be suitable also for use as a design, may at the owner's election be protected either by copyright or by patent. *On this broad question we express no opinion.*" [Italics ours.]

The Circuit Court of Appeals concluded that the case could be disposed of on the ground on which the bill was dismised by the Circuit Court, and held as follows:

> "The case before us can be disposed of on the ground that, assuming that the complainant's painting is such a one, the statutory conditions precedent to the investiture of the right to protection under the copyright law have not been complied with. For seventy-five years it has been the settled law of this country that protection under the copyright law is granted only to those who perform the conditions essential to a perfect copyright title. Wheaton v. Peters, 8 Pet. 591, 665; Merrell v. Tice, 104 U. S. 557, 560; Callaghan v. Myers, 128 U. S. 617, 652; Thompson v. Hubbard, 131 U. S. 148-150; Higgins v. Kneuffel, 140 U. S. 428; Pierce & Bushnell Mfg. Co. v. Werckmeister, 72 Fed. 54; Osgood v. A. S. Aloe Instrument Co., 83 Fed. 470, 470; Freeman v. The Trade Register, 173 Fed. 419. Copyright protection is wholly statutory and one who claims it must prove affirmatively his performance of all the statutory conditions precedent to his right of action.
>
> "In the case before us the subject of the alleged copyright is a painting. Section 4952 of the Revised Statutes gives to each author or proprietor of a painting, upon complying with the provisions of the chapter concerning copyright, the sole liberty of copying and vending the same. The first section of the Act of June 18, 1874, which supersedes section 4952 of that chapter, declares that no person shall maintain an action for the infringement of his copyright 'unless he shall give notice thereof, . . . if a . . . painting, . . . by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words,' &c. This language means that each reproduction or copy of the painting must be accompanied with the statutory notice, as the circuit court properly held. It is not sufficient to affix the notice to one in each dozen reproductions of the painting, as was done

in this case. Section 4952, which gives to the author or proprietor of a painting the sole liberty of copying it, and selling the copies, and section 1 of the Act of June 18, 1874, concerning notice, taken together, mean that no perfect title to a copyright can be had unless every copy sold contains the prescribed notice. The purpose of the notice is to inform the public. Obviously, a single notice on a sheet containing a dozen copies of a painting is not the notice contemplated by Congress.

"The decree dismissing the bill of complaint is affirmed for want of a sufficient copyright notice."

Statement of the Questions Involved.

The decisions of both lower courts having unqualifiedly sustained the above recited third defense (failure to mark the several copies copyrighted), the same will be first discussed herein. The other defenses above recited will also be discussed, but of course the Court need not consider them unless it should disagree with the conclusion, arrived at by both lower courts, that the appellant has failed to comply with the statutory provision as to marking. As no appellee can safely conclusively assume that an appellate court will approve the *ground* on which the decision of an inferior court is supported, it is clear that it is both the right and duty of appellee to point out any other ground that may exist which justifies the decree dismissing the bill and which would, in and of itself, render any other decree erroneous. Appellee, therefore, herein presents and argues *all* the grounds which separately would enforce a decree in its favor. These grounds (which are merely a rearrangement of those recited hereinbefore) may be enumerated as follows:

First.—Assuming that Appellant's Design was Copyrightable as a Painting, the Copyright is In-

valid by Reason of Publication by Appellant of Copies Not Marked Copyrighted.

Second.—Appellant's Design is Not a Painting, but is a Design for an Article of Manufacture, and as such cannot be Protected by Entry or Registration in the Copyright Office, but should have been Protected by Means of a Design Patent.

Third.—If Appellant's Design were a Work of the Fine Arts and Not a Design for an Article of Manufacture, or if Appellant could Elect between Design Patent Protection and Copyright Protection, the Design would Not be Copyrightable as a "Painting," but Only as a Lithograph or Chromo, and the Error in Classification Invalidates the Copyright.

Fourth.—If Appellant's Copyright were Valid, Appellee has Not Infringed it.

Inasmuch as the reasoning of both lower courts, as well as their conclusion, with respect to the defense which is now designated "*First*"—failure to mark the several copies copyrighted—is deemed to be sound, this defense will first be discussed.

ARGUMENT.

Assuming That Appellant's Design Was Copyrightable as a Painting, the Copyright Is Now Invalid by Reason of Publication by Appellant of Copies Not Marked Copyrighted.

As may be seen by an inspection of "Defendant's Exhibit Sheet of Complainant's Box Paper No. 1," each sheet of box paper made and sold by appellant contains *twelve copies* of the copyright design, and *one only* of said twelve copies is marked with a copyright notice.

Section 4962 of the Copyright Law in force at the date of the commencement of this suit provides that:

> "No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page, or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, *painting*, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz.: 'Entered according to Act of Congress, in the year , by A. B., in the office of the Librarian of Congress at Washington'; or, at his option, the word 'Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out thus: 'Copyright, 18 , by A. B.'"

Appellant virtually concedes (Appellant's Brief, p. 5) that if the present case sought to enforce forfeiture under the penal provisions of section 4965, the construction of section 4962 made in this case by the Circuit Court and Circuit Court of Appeals would be correct.

> "Such an interpretation as is here contended for is only resorted to where the proprietor of the copyright seeks to enforce *forfeiture* under those highly penal provisions of section 4965 of the statutes inflicting a penalty and forfeiture upon the infringer for violation of the copyright."

Appellant's position is therefore that the section 4962 should have one interpretation in an equity suit and a contrary interpretation in an action for forfeiture or penalty. The application of this doctrine would give rise to endless confusion.

The fact is that the statute should have a "fair and reasonable construction" whatever the form of

action may be. But the requirement of section 4962 that "No person shall maintain an action for infringement of his copyright unless he shall give notice thereof" in the manner prescribed by the section applies to all classes of actions and certainly does not warrant appellant's contention that a notice not in accordance with the requirements of the section would prohibit an action for penalty or forfeiture while allowing a suit for injunction and profits.

The case of *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, which is the first case cited by appellant, decided that in the case of a painting which was not publicly exhibited so that all might see and copy it (see p. 300) the painting itself need not be marked "copyright" but only each published copy thereof must be so marked. The Court quoted with approval from Lithographic Co. v. Sarony, 111 U. S. 53, as follows:

> "With regard to the latter question it is enough to say that the object of the statute is to give notice of the copyright to the public by placing *upon each copy*, in some visible shape, the name of the author, the existence of the claim of exclusive right, and the date at which this right was obtained." [Italics the court's.]

This language, while used in a case presenting a state of facts different from that in the present case, is "fairly and reasonably" applicable to the present case.

In Pierce, &c., Co. v. Werckmeister (C. C. A.), 72 Fed. Rep. 5, the Court, interpreting the foregoing section, stated (p. 57):

> "The words 'several copies' are not used in the sense of a copy or reproduction from some original, but are used in the sense of each individual copyrighted thing, whether a copy or an

> original, so called; and the words following, 'of every edition published,' plainly mean each published production or reproduction of every copyrighted thing. In Webster's International Dictionary we find, among the definitions of the word 'copy': 'An individual book, as a copy of the Bible'; and it is in this sense the word is used in this section. We copyright a book under sections 4952 and 4956, and section 4962 then requires that, in order to maintain an action for infringement, notice of copyright shall be inserted in each book (whatever may be the form of the book) which is published, and upon each book of every edition or reproduction which is published. . . . We copyright a map, and section 4962 declares that, in order to enforce our rights against infringers, notice of copyright must be inscribed upon each published map, and upon each map of every edition or reproduction which is published. . . . We copyright a chromo, which is a picture produced by the process of chromo-lithography, and section 4962 declares that notice must be inscribed upon every published chromo. Each chromo is as much an 'original' as a 'copy,' and either term applies equally well to all chromos. We copyright a *painting*, and section 4962 requires notice of copyright upon the published painting, and upon *each replica or reproduction which is published*. And what has been said with respect to a book, map, chromo, or painting applies to the other copyrighted things enumerated in this section."

It thus seems clear that the statute, in accordance with its plain wording and with the judicial interpretation of that wording, requires that the copyright mark must be placed *upon some visible portion of each copy* or of *the substance on which the same shall be mounted*. In the present case, the copyright mark appears on *a visible portion of one copy only of the twelve*. So far as the other eleven copies are concerned, the copyright

mark does *not* appear on any visible portion thereof. Nor can it be held, under any reasonable construction of the words of the statute, that the copy that is marked is the *substance on which the other eleven copies are mounted.*

If the twelve copies so physically attached together are separated, the copyright mark appears on only one copy. Certainly the mere fact that several copies are physically attached to each other does not relieve complainant of its obligation under the law to mark each copy.

We believe that the conclusion reached by the Circuit Court and the Circuit Court of Appeals is absolutely sound and will not be disturbed. The Circuit Court states (p. 111):

> "But it follows that if the owner or author treat the picture as belonging to the fine arts and protect it by copyright, he must strictly obey the copyright laws. *He must treat each reproduction as a separate copy of the original, and must mark it as Congress has prescribed.* Reasonable freedom in the form of marking is permitted, if the substantial requisites are present. *Blume v. Spear,* 1887, 30 Fed. 629; *Sarony v. Burrow-Giles Co.,* 111 U. S. 53; but as far as I am advised the requirement has not been relaxed that *each separate reproduction of a copyrighted painting must bear the statutory notice. Pierce, &c., Co., v. Werckmeister* (C. C. A.), 72 Fed. 57."

No useful purpose would be served by discussing the numerous cases cited by appellant, all of which, with one or two exceptions, decide points of law wholly unrelated to the point raised in the present case. The cases which are relied upon as deciding points *analogous* to the one herein involved may be briefly discussed.

Perhaps the chief case relied upon by appellant is *Edison v. Lubin* (C. C. A. Third Circuit) 122 Fed. Rep. 240. We believe that the comment of the Circuit Court upon this case is sufficient to dispose of it as an authority. The Circuit Court said (p. 111):

> "It was there held that a sheet containing a series of 4500 small pictures, intended to be reproduced in a motion camera, was a single 'photograph,' and was protected by a single copyright notice attached to one end of the sheet. The reproduction of the subject-matter was not complete until every small picture had contributed its share to the total effect. Being, therefore, essentially a single 'photograph,' one marking was enough."

Speaking of the present case, the Circuit Court said (p. 111):

> "In the present case the plaintiff did not attempt to reproduce the painting separately in order to sell the copies in that form. On the contrary, twelve complete copies were lithographed and printed upon one sheet, the picture having been so painted that each copy would join harmoniously with its neighbors, and the repeated design would thus produce a pleasing decorative effect. But there were twelve reproductions of the painting, while the sheet was marked in only one place with the notice required by law. In other words, the plaintiff *having copyrighted a work of the fine arts, attempted to reproduce it as if it had been patented as a mere design*, and has naturally gotten into a fatal difficulty. The copyright could only protect the reproductions if each separate copy should be marked, and as this was not done the statutory protection was vitiated."

This Court will note the circumstance that *Edison v. Lubin* was decided by the very Court of Appeals from whose decision the present appeal is taken.

The case of *Harper & Bros. v. Kalem Co.*, 169 Fed. Rep. 61, involves precisely the same point as *Edison v. Lubin.*

The reference to stereoscopic photographs, of which the Court is asked to take judicial notice, is obviously not in point. As is well known, the two pictures constituting the same are two different photographs taken simultaneously at slightly different angles, and constitute a unitary thing composed of two similar but not absolutely identical pictures. The published copies are each identical with the double photograph deposited at the Copyright Office and of course need be marked but once.

Appellant quotes from *American Tobacco Co. v. Werckmeister, supra*, to establish the proposition that "the purpose and object of the act is to give notice to the public—that is, to the persons who buy or deal with the published thing."

In the present case only the original wholesale purchaser of the covering paper receives notice of the copyright. The retailer and ultimate purchaser—those who deal in or buy the boxes or other articles covered with the paper—receive no notice unless it happens that the box purchased is covered, in whole or in part, with the particular copy that contains the copyright notice. *

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* It is admitted by Mr. Meyer, paper box manufacturer and appellant's witness, that a single sheet of appellant's paper would cover a dozen of his smaller boxes, and that therefore the copyright notice, even if not cut off or turned under, would appear on only one of every twelve boxes (XQ. 18-19, RDQ. 20, p. 70). Mr. Janes, box paper dealer and appellant's witness, says he can only recollect one order—and of that he has only a "slight" recollection—where a box was big enough to require a whole sheet (Q. 10, p. 46).

Appellant asserts that in certain cases the copyright law provides that notice may be put "upon the back or bottom of such articles, or in such other place upon them as it has heretofore been usual for manufacturers of such articles to employ for the placing of manufacturers, merchants and trademarks thereon"; and argues that as the evidence shows it to be the custom to place the statutory imprint upon lithographic sheets in the way adopted by complainant, the requirements of the statute are satisfied.

In the first place, an examination of the section referred to (4962) shows that only in the case of "molded decorative articles, tiles, plaques or articles of pottery or metal" is it specified that the mark may be applied in accordance with "custom." The necessary inference is that with respect to "paintings" and the other subjects enumerated in the section, the different mode of marking expressly prescribed must be followed. In the next place, there is no evidence whatever, notwithstanding appellant's statement at the bottom of page 13, that it is customary to apply to lithographic sheets containing a multitude of copies of a copyrighted "painting" a single notice in the manner adopted by applicant. It is true that where the design has been copyrighted as a *lithograph* or *chromo* by depositing in the Copyright Office *two sheets of paper similar to those published and sold*, as prescribed by the statute, it is customary to so mark the sheet. And such a mark is in strict conformity with the law. But the record is destitute of any evidence showing that where a design is copyrighted as a *painting*, it is customary to publish sheets each containing a multitude of copies of painting and to apply the mark to only one copy of the entire sheet. Nor could such a custom, if it existed, be accepted as a compliance with the positive requirement of the statute.

It is also averred that if the copyright mark were applied to each copy of the "painting" the paper would be unsalable. But surely evidence that compliance with the statute would be a serious handicap in the business of making and selling such sheets is not equivalent to evidence that the positive requirement of the statute has been observed. It would be as reasonable to allege business convenience as an excuse for the omission of the copyright marking on *all* copies.

The position of appellant is, we think, quite sufficiently answered by the Circuit Court on page 112 of the Record:

> "It is argued for the plaintiff that notice need only be given to the purchaser of the sheets, who is ordinarily the manufacturer of the boxes or other articles to be covered, and that a single marking upon each sheet is ample for this purpose. But this argument *ab inconvenienti* can have no weight against the positive command of the statute. *The plaintiff would have probably had no trouble about notice if the picture had been patented as a design. It was intended for such a use, and the protection that was needed could have been best obtained under section 4929. But as another kind of protection was also available and was chosen, its express requirements must be strictly obeyed. The Court need not be astute in finding a way to give the plaintiff the appropriate protection that was offered by Congress, but was not accepted.*"

The fact is (assuming the right of appellant to secure a monopoly of a particular design for box paper by copyrighting the original design as a "painting") that appellant has put its "painting" to a use which the statute certainly did not contemplate. If the statute had contemplated such use, the provisions as to marking would have been different so as to meet the practical requirements attendant upon such use. The Court is certainly quite right in holding that if appel-

lant chose (assuming it has the right to choose) a form of protection other than that offered by Congress under the design patent law and best adapted to the subject-matter sought to be protected, it should not complain that the requirements as to marking are such as, if observed, would obstruct or prevent the use to which it applied the "painting."

The fact is, as established by evidence hereinafter quoted, that the box paper with appellant's design applied is utterly worthless as such and is valuable only by reason of its capacity for use in covering boxes. The sole value, actual and contemplated, of appellant's painting resides in its capacity for reproduction in repeat form to produce a design of indefinite extent having its metes and bounds anywhere and nowhere, so as to adapt it to be cut up along any lines and applied to boxes of any size and shape, and it is only when so applied to boxes or similar articles that the design makes its effective appeal to the ultimate purchaser. But with the mode of marking adopted by appellant, the ultimate purchaser receives no notice whatever of copyright. Nor does even the retailer who purchases the covered boxes and sells to the ultimate consumer receive any notice.

The foregoing thought strongly confirms our view that the law does not contemplate the extension of copyright protection to *designs for articles of manufacture* (except such works of the *fine arts* as are enumerated in section 4962), still less to those of a matching repeat form which infallibly exhibit intrinsic evidence of their character as such, and that the attempted protection of such designs by copyrighting them as *paintings* is as much a perversion of the copyright law as the analogous attempt (which, as we shall see, the courts have discountenanced) to copyright as paintings matter designed for reproduction as labels and prints. This brings us to a consideration of the next defense.

Appellant's Design Is Not a Painting, But Is a Design for an Article of Manufacture and as Such Cannot be Protected by Entry or Registration in the Copyright Office, But Should Have Been Protected by Means of a Design Patent.

In considering this point the Court should have before it Section 4952 R. S. of the copyright law in force at the date of complainant's copyright and Section 4929 R. S. of the design patent law then and now in force.

Section 4929 of the design patent law reads as follows:

> "Section 4929. Any person who has invented any new, original and ornamental *design for an article of manufacture*, not known or used by others this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law and other due proceedings had, the same in cases of invention or discoveries covered by section forty-eight hundred and eighty-six, obtain a patent therefor."

Section 4952 of the copyright law, as well as other sections of the copyright law that the Court may find it necessary to consider, are set forth at the end of this brief.

In the Circuit Court, we took the position that appellant's alleged "painting" was in fact a design for an article of manufacture and could be protected only by a design patent.

Appellant urged that the design was capable of both copyright and patent protection.

The Circuit Court, virtually overruling both contentions, announced the "doctrine of election" which permits a designer to choose between the two forms of protection. The Circuit Court stated that none of the cases seems to have decided the question, and the doctrine announced by the Circuit Court is therefore admittedly novel. We submit that the doctrine is not only novel, but wholly opposed to the spirit of our patent and copyright laws, and wholly opposed to the reasoning of the courts in analogous cases.

The Circuit Court unintentionally misstates our position at the outset of its opinion. The opinion states (p. 108) that "The principal defense is that the painting was not the subject of copyright at all, but should have been patented under section 4929 of the Revised Statutes as a design for an article of manufacture."

Our position is, not that the "painting" was not the subject of copyright, but that the subject-matter of the copyright *is not a "painting"* in the sense of the copyright law, but *is a design for an article of manufacture* in the sense of the design patent law. The assumption that the original of the design is a "painting" is to virtually assume its copyrightable character—which is the very question at issue. The Court will note that the assumption that appellant's design is a "painting" permeates the entire opinion, and with this assumption, and because the law expressly provides for copyrighting a "painting," a reasonableness is lent to the conclusion that anything which is *painted* is copyrightable.

Our position is that Congress, in enacting the design patent law and the copyright law, had in view only two classes of works of art or decoration—those intended for application to the useful arts and those intended for application to the fine arts. There is nothing to warrant the presumption that Congress contem-

plated that the designer of a work of art or decoration intended for application to the useful arts (*i. e.*, to any article of manufacture other than those of the fine arts enumerated at the end of Sec. 4962 R. S.) would have the right to "elect" to receive protection entirely different from, and far more comprehensive than, that protection by the law relating to such designs.

The decisions cited by the Circuit Court all enforce our position. Each of them, whether it holds the copyright valid or invalid, bases its conclusion upon the finding that the subject-matter falls definitely on one side or the other of the line separating things copyrightable as works of the fine arts from things not so copyrightable. None of them holds, as does the Circuit Court in the present case, that the subject-matter occupies a territory lying on both sides of the line.

We submit that there is no such neutral territory and that this Court should not adopt the view that such a neutral territory exists. A recognized "zone of neutrality" between copyrights and patents will, as we shall hereinafter point out, overturn the practice of the Copyright Office and the Patent Office and lead to as much confusion and danger in the domain of law as similar zones of neutrality create in the domain of world politics. We hereinafter discuss this "doctrine of election" more fully (see pp. 35-43 *infra*).

There is no inherent difficulty in prescribing the tests for determining the nature of any disputed subject-matter, and no inherent difficulty in applying those tests. A consideration of the cases cited in the opinion of the Circuit Court will show that two tests have been applied by the courts, namely:

(1) Does the subject-matter bear on its face the indicia of its essential nature?

(2) For what purpose was the subject-matter designed?

If we consider the case of *Bleistein v. Donaldson & Co.*, 188 U. S. 239, the Court there decided that chromolithographs representing actual groups of persons and things, designed from hints or descriptions of the scenes represented, and which were to be used as advertisements for a circus, were copyrightable as pictorial illustrations under Section 4952 R. S. Here the subject-matter bears on its face the indicia of its essential nature. They could not have been copyrighted as prints or labels in the Patent Office because they were obviously not adapted to be applied to an article of manufacture. They could not have been patented because they were obviously not designs for any article of manufacture.

If they were not copyrightable as a work of the fine arts they could not have been protected at all. This case, therefore, illustrates a subject-matter which bears on its face the indicia of its essential nature as a copyrightable thing.

In *Schumacher v. Schwencke* (1885), 25 Fed. Rep. 466, and *Schumacher v. Wogram* (1888), 35 Fed. Rep. 210 (discussed in the opinion of the Circuit Court on pages 110 and 111), where the subject-matter exhibited certain characteristics of paintings, the question whether they were copyrightable as such was held to depend upon the use for which they were originally intended. In the first case, a work possessing the ordinary qualities of a painting was held to be copyrightable notwithstanding that copies of the same were used as a label for articles of manufacture, the Court however stating—

> "Were it conceded that this painting was *intended exclusively for a label, or as the first step in making a label*, a much stronger case for the defendants would be presented. But *such is not the fact*, and it is clear from the affidavits that *it cannot be established by the evidence.*"

The same court (S. D. N. Y), in the second case, held that a work of precisely similar character was *uncopyrightable as a painting because the proofs showed that the "painting" was intended exclusively for a label, or as the first step in making a label.**

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* WALLACE, J. "The plaintiffs seek an injunction *pendente lite* to restrain infringement of their alleged copyright in a picture. It appears that the plaintiffs manufacture prints or labels, and sell them to dealers in cigars and other manufactured articles, to be affixed to cigar boxes or other articles. The plaintiffs in making their prints, design a pictorial illustration in colors, cut an impression of it upon lithographic stones and print copies. In the present case they designed a picture representing a young woman holding a bouquet of flowers, and took proceedings under the statute to copyright the picture. They delivered at the office of the Librarian of Congress a description of the picture by the title 'Nosegay,' accompanied with a photographic copy, and within ten days delivered another lithographic copy. Thereupon, and on February 2, 1885, the librarian duly recorded the name of the picture. Upon the prints struck off and sold to dealers the words 'Opera Bouquet,' a name descriptive of a certain brand of cigars, was substituted in place of the word 'Nosegay,' and a notice inscribed upon the face of the print gave the date of the copyright as of the year 1884 instead of 1885. The infringement now complained of consists in the copying by the defendants of some of these prints.

"The facts show an attempted evasion by the plaintiffs of the provisions of section 3 of the Act of Congress of June 18, 1874, 'to amend the law relating to patents, trade-marks and copyrights.' That section declares in substance that no prints or labels designed to be used for any article of manufacture can be copyrighted, but authorizes them to be registered and protected as trade-marks in proper cases. If the experiment of the plaintiffs can succeed, this statute is inoperative whenever the prints or labels contain a pictorial illustration; and it could be wholly nullified by the device of printing pictures on the labels. The case of

We shall hereinafter show, by reference to the evidence, not only that appellant's design *was intended exclusively for application to an article of manufacture and was the first step in the production of a design for an article of manufacture;* but also that to any one skilled in the art of commercial designing, *it*

Schumacker v. Schwenke, 25 Fed. Rep. 466, is distinguishable from the present, because in that case the Court found that the picture copyrighted was not made to be used for labels. . . . The motion is denied."

The analogy between this case and the present case is very striking.

In each case the suit was for infringement of a copyright for a painting. (See "Defendant's Exhibit Certificate of Record of Copyright of 'Nosegay' Painting.")

In each case the original "painting" was designed *not as a finished work of art* but as *the first steps in the production of something other than a painting for which the law provides a different kind of protection.*

In *Schumacker v. Wogram*, it was held that the original "painting" was nothing more or less than a *design for a label* and that complainant was entitled to protect it as such only by registering it as such in the Patent Office.

In the present case it is clear that the original "painting" is nothing more or less than a *design for an article of manufacture* and that appellant is entitled to protect it as such only by means of a design patent.

In both cases the "painting" was *reproduced in multiple by lithography.*

In both cases, the facts show an attempted evasion of the law relating to patents, trade-marks and copyrights.

In this case, as in that, the law is virtually nullified if appellant can obtain one kind of protection when the law provides another.

In this case, no more than in that, has the appellant the right to arbitrarily call the original design a "painting" simply because it is a picture in colors.

The fact that appellant's design was not intended for a *label*, but for *an article of manufacture*, simply

is apparent from inspection that appellant's design is a design for an article of manufacture and specifically a **box paper design.** If this evidence be accepted, it is clear, applying either of the tests for determining the nature of the subject-matter, that appellant's *design arranges itself definitely on the patent side of the line separating copyrightable things from patentable things.*

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distinguishes this case from Judge Wallace's decision in an unimportant matter of fact and not in principle. The principle underlying the case is that an author, inventor or designer *cannot arbitrarily choose the sort of protection he desires.* If he wishes to be protected *he must obtain the sort of protection that the law provides for the special thing he has invented, designed or produced.* The statute does not state that a "painting" that in fact is a design for an article of manufacture shall not be deemed within the act. That would be a contradiction in terms. What the law does say is that *a label must be registered in the Patent Office* and that *a design for an article of manufacture must be protected by a design patent.*

The argument of appellant that because section 4952 specifically provides that prints or labels for articles of manufacture cannot be registered in the Copyright Office, but must be registered in the Patent Office, and makes no special mention that designs for articles of manufacture cannot be registered in the Copyright Office, therefore the presumption must be that designs for articles of manufacture *can* be registered in the Copyright Office is fallacious in the extreme. The reason that the copyright law specifically excludes prints and labels intended for articles of manufacture from registration in the Copyright Office is because they are copyrightable things, which if they were not specially excluded would be registerable in the Copyright Office; and the law simply provides that the Commissioner of Patents shall have jurisdiction of *this class of copyrights.* There was no occasion for the copyright law to specifically exclude *uncopyrightable things*—provision for the protection of which is found in the design patent law.

The Circuit Court was also, we submit, in error in allowing the artistic merit which it may be conceded appellant's design possesses to constrain it to hold that the design was copyrightable. A design for an article of manufacture, equally with a painting or lithograph, must be a work of art. The law provides that a patentable design must be "new, original and ornamental," all of which qualities necessarily characterize a copyrightable painting, chromo or print. In the leading case of *Rowe v. Blodgett & Clapp Co.*, 112 Fed. Rep. 61, the Circuit Court of Appeals for the Second Circuit quoted with approval the opinion of the Circuit Court in the same case, in which it was said:

> "I decide this case upon the broader ground that patents for designs are intended to apply to matters of *ornament*, in which the utility depends upon the pleasing effect imparted to the eye, and not upon any new function.
>
> "Design patents refer to appearance, not utility. Their object is to encourage *works of art and decoration* which appeal to the eye, to the esthetic emotions, to the beautiful.
>
> "The term 'useful,' in relation to designs, means adaptation to producing pleasant emotions. There must be originality and beauty."

It is thus clear that a copyrightable painting and a patentable design for an article of manufacture have certain qualities in common. Both are "*works of art or decoration*," in the broad sense of the term. Both "appeal to the eye, to the esthetic emotions, to the beautiful." And any original design intended for embodiment in, or reproduction upon, an article of manufacture presenting a flat surface, such as fancy box paper, wall paper, wrapping paper, carpets, rugs, oil cloth, and the like, must necessarily be "painted" or "drawn."

Nor does the *degree* of artistic merit possessed by any production determine its classification. A patent-

able design, such as a textile fabric, wall paper or box paper, may conceivably possess a degree of artistic merit not inferior to the finest painting; and conversely, as in *Bleinstein v. Donaldson Lithographing Co., supra*, a copyrightable chromo, such as for the circus poster therein involved, may be crude and coarse, and appeal, not to the fine artistic sense of a connoisseur, but to the uneducated taste of the masses. It is only necessary, in the case either of a commercial design or a painting, that the subject shall be pleasing and attractive to some portion of the public.

Now, it is clear from the opinion that the Circuit Court based its conclusion, that complainant's design was copyrightable, upon the artistic character of the design. The Court says (p. 175):

> "It clearly appears that the painting now in question is artistic in thought and execution, and it was, *therefore*, entitled to protection by a copyright, if a copyright was desired."

It is clear that the fact that a production is "artistic in thought and execution" no more raises a presumption that it is copyrightable than that it is patentable. It simply raises a presumption that it may be protected in one way or the other dependent upon the purpose for which it is *adapted* and *intended* to be used.

And again (p. 182) the Court says:

> "If a painting is obviously artistic, it is, I think, entitled to copyright, whatever the applicant may intend to do with the reproductions. . . . If, however, the painting is obviously a mere design, lacking in such artistic quality as entitled it to be ranked among the reproductions of the fine arts, copyright may be properly refused."

Here the Court assumes, apparently without warrant, that the copyrightable nature of a production

depends upon whether it possesses artistic qualities, or at least upon the *degree* of artistic quality that it possesses. Surely no warrant is to be found for this distinction either in the statutes or in the decisions. To what domain a production shall be assigned depends primarily, and we think exclusively, upon whether it is adapted and intended for the fine arts or whether it is adapted and intended for the useful arts.

Having discussed the law as we understand it, let us consider the *testimony* establishing that *appellant's design was* **in fact** *a design for fancy paper for covering boxes, was produced especially for use as a box paper design, exhibits inherent evidence of its production for that purpose, and was in fact used solely as such by appellant.*

In the application for preliminary injunction, certain testimony was given by two of appellant's officers, who died before the testimony was taken. The following cross-question was propounded to *Mr. Charles W. Frazier*, secretary of the Brett Lithographing Company, who, acting for the appellant, commissioned the designer, Mr. George F. Muendel, to make the design in question (pp. 33-34):

> "XQ. 32. The late Mr. Beusch has given an affidavit in this case that 'Complainant's Exhibit Copyrighted Painting' was purchased from the artist who painted it for the purpose, among other things, of employing it as a design for fancy and ornamental papers for boxes and other articles to be sold at Christmas and New Year's, and the late Mr. Zentgraf has given an affidavit in this case in which he states, 'that the painting which was copyrighted by the complainant on the 23rd of September, 1905, as set forth in the bill of complaint, *was produced especially to provide an artistic and attractive paper to be used in the manufacture of boxes* and other articles intended to be sold at

Christmas and New Year's.' Do the statements made by these gentlemen coincide with your own recollection or understanding?''

To which he replied:

''A. *They do.*''

Mr. George F. Muendel, the designer, confirms Mr. Frazier (XQs. 24-27, p. 29), stating that he was commissioned to make a ''*fancy paper design* suitable for the Christmas holidays,'' and that ''the order called for a fancy paper sketch, and by that is meant a sketch that can be carried along indefinitely by simply reproducing the same thing and placing them side by side.''

It is conceded that *a box, or a paper covering therefor, is an article of manufacture.*

Appellant's own testimony would therefore seem to conclusively establish the fact that appellant's design falls inevitably on the patent side of the line separating copyrights for works of the fine arts from patents for designs for articles of manufacture.

In view of the testimony of appellant's own officers and the testimony of the artist or designer that the work is a design for an article of manufacture, little weight should be given to any evidence supposed to support appellant's contention that the design is a ''painting'' in the sense of the copyright law. This evidence, in any event, fails to support its contention. It consists of the testimony of Messrs. *DuMond* and *Low*, who, speaking as artists, testify that the same is a ''work of art'' (DuMond, Q. 9, p. 12; Low, Q. 10, p. 20). There is no occasion to take issue with appellant's witnesses on this point. We have shown that the subject-matter of a design patent must be a ''work of art.'' And therefore all that appellant's testimony can be held to prove, so far as the matter is capable of proof, is that appellant's design possesses one attribute common to copyrightable paintings and to pat-

entable designs, namely, that it is a "work of art or decoration," that it, "appeals to the eye, to the esthetic emotions, to the beautiful"; and such testimony therefore fails to assist in determining the proper classification of appellant's design.

If the admitted *purpose* for which the design is produced is not decisive of the class to which it must be assigned (and we think that the reasoning of *Schumacher v. Schwenke and Schumacher v. Wogram, supra*, establish the affirmative of this proposition), it is nevertheless clear that appellant's design bears *intrinsic evidence* of its character as a design for an article of manufacture and particularly for box paper. Let us, preliminarily, endeavor to define a "painting" in the sense of the copyright law and a "design" in the sense of the design patent law.

A painting, in the popular, and we think also in the legal, sense is a thing of intrinsic value as such, a thing that serves its ultimate purpose by pleasing the eye when exhibited, and a thing for permanent preservation.

A design for an article of manufacture is, on the contrary, not ordinarily a thing of any intrinsic value as such, but is rather a thing that imparts value to the article to which it is applied. It is not a thing that serves its ultimate or chief purpose by pleasing the eye when exhibited, but on the contrary is a thing which is rarely if ever exhibited as such, and serves its chief and ultimate purpose, and indeed its sole purpose, when applied to the manufactured articles for which it was designed. It is not a thing that is permanently preserved, but is a thing that is destroyed or disposed of indifferently when it is once embodied in the manufactured articles for which it was designed.

To one skilled in the art of commercial designing, it is apparent from inspection that appellant's design

falls into the class of designs for an article of manufacture and not into the class of paintings.*

George A. Sook (p. 79), testifying for appellee, is a general commercial designer of twenty-five years' experience. He testifies that "Complainant's Exhibit Copyrighted Painting" is a design (Q. 4), that he can tell from inspection that it is "intended for a box paper or possibly a wrapper" (Q. 5); that no commercial designer would ever call it a "painting" (Q. 7); that such a design, after once being transferred to the lithographing stone, "is of no particular value and the general rule is to file them away for reference, or destroy them" (Q. 8).

William Gosewisch (p. 81), another commercial designer, of twenty years' experience, testifies that "Complainant's Exhibit Copyrighted Painting" is a "design" "for box papers" (Qs. 3, 4); that no one in his trade or profession would call it a painting (Q. 5); that he has never known, in all his experience, of a design of the character of "Complainant's Exhibit Copyrighted Painting" to be framed (Q. 6); that designs for box paper, and the like, of the character of

* The argument that defendant's witnesses are not artists of reputation and therefore cannot be heard to contradict DuMond and Low, is somewhat curious. Sook, Gosewisch, Bowman and Greene are commercial designers whose life work is the production of designs of the precise character of appellant's design. Scherr is a lithographic artist whose work is the *re*-production of designs of the precise character of appellant's design. Bacon and Schaut are picture dealers, who sell paintings and other works of the fine arts. Neither DuMond nor Low ever produced designs of the character of appellant's design (Low, A. to XQs. 27 and 29, pp. 23 and 24). It must be apparent that appellee's witnesses are better qualified than appellant's witnesses to pass judgment upon the proper classification of appellant's design.

appellant's design, are, after application to the lithographic stone, of no value at all (Q. 7); that then such original designs are either filed away for reference or destroyed (Q. 8); and that he has never known of an original design of the character of appellant's design to have been sold for a valuable consideration after it had served its purpose (Q. 12).

C. Horace Bowman (p. 83), another commercial designer, of seven and a half years' experience, testifies upon inspection of "Complainant's Exhibit Copyrighted Painting" that it is a design intended to be applied to "a wrapper or paper which is used to go around fancy boxes" (Qs. 5, 6); that no one would call it a painting (Q. 7); that the original possesses no intrinsic value after it has been applied to the lithographing stone (Q. 8); that the "stone artists," as they are called, "often resort to cutting the sketch (design) in two or more parts which enables them to have different stone artists work on it at the same time" (Q. 10); that the original designs, after reproduction, "are sometimes saved for reference, but are usually destroyed" (Q. 12).

Harry S. C. Bacon (p. 86), salesman and member of the firm of Gilbert & Bacon and Bacon Art Company, testifies, from inspection, that "Complainant's Exhibit Copyrighted Painting" was "meant for a lithographic work."

John M. Scherr (p. 87), an employee of appellee, and a "lithographic artist" of many years' experience, testifies that it is appellee's custom, with respect to original designs for box paper, to "merely throw them away, they are of no value whatever" (Q. 9), and that from his experience he would say that "Complainant's Exhibit Copyrighted Painting" is "a box paper design," "made to repeat." He also states that he has lithographed paintings (Q. 13). Asked to distinguish

between a painting and a design, he states (Q. 14) that the designer's

> "main effort is to make a sketch that will look well in repeat and finishes the edges of a design as well as other parts, so in repeating it will form a design as a whole, and its value is in the repeat forming a picture. Well, in regard to a painting, the picture is finished without regard to repeats and it is something beautiful in itself. The main work is to finish the point that tells the story and all the surroundings and edges are finished to help the central story out, without regard to repeat."

The witness also testifies that an original design is "very often cut into pieces to finish the work more rapidly, so three or four men may work on the same design" (Q. 16).

Jacob C. Schaut (p. 93), a picture dealer and picture framer for thirty-seven years, testifies that "Complainant's Exhibit Copyrighted Painting" would not be termed a "painting" in his business (Q. 4), and would not be a salable commodity, framed or unframed (Q. 5), and that it looks as if it were intended to be "used for decorating or wrapping purposes, such as wrapping boxes or packages."

Frank Greene (p. 103), a designer of textile fabrics, testifies from an inspection of "Complainant's Exhibit Copyrighted Painting" that it is a design (Q. 6) intended to be applied to some article of manufacture (Qs. 7, 8), that it would "decidedly not" be designated in his profession as a "painting" (Q. 9), that it does not differ in principle from designs that he himself has made as applied to wall paper, textile fabrics, etc. (Q. 10), and that original designs are, in his experience, "filed away for future reference for a number of years and then are put into the furnace" (Q. 14).

There is no testimony on behalf of appellee that in any wise tends to impair appellee's testimony. While the witness *DuMond* testifies that it would be proper to call appellant's design a "painting," the only reason he gives for so calling it is that it is "executed in water colors" (Q. 10, p. 13). He repeatedly refers to the alleged painting as a "design" and to the author thereof as a "designer," and thinks that the design would be applicable "to the ornamentation of fabrics for wearing apparel, for hangings, or for the embellishment of household articles and personal properties"—*all articles of manufacture*. He nowhere suggests that the design has any value *except as applied to an article of manufacture*.

While appellant's witness *Low* testifies that it would be proper to call it a "painting" (Q. 10, p. 20), he too refers to it as a "design," and in answer to questions 12, 15, 18, 26 and 29, suggests the possibility of applying it to other articles for which the design was certainly never intended and to which it was certainly never applied and which other articles are, at any rate, mostly articles of manufacture. He also testifies that "designs produced especially for application to box paper, wall paper, carpets, hangings and other articles of manufacture" are painted "quite often in water color," and that such designs are all, in his opinion, "works of art" in the same sense that appellant's design is a work of art (XQ. 26).

We have already alluded to the fact that *George F. Muendel*, appellant's witness, made complainant's "Copyrighted Paintings" in execution of a commission to make a design for fancy box paper (XQs. 24-27, p. 29). Mr. Muendel admits that "those things are always referred to as fancy paper designs in the lithographing trade" (XQ. 24).

We have also referred to that fact that *Charles W. Frazier*, appellant's witness, testifies that he commissioned Mr. Muendel to make "Complainant's Exhibit Copyright Painting" especially as a design for fancy and ornamental paper for boxes (Q. 7, p. 31; XQ. 32, p. 33).

It is therefore clear, by undisputed testimony, that while, like a painting, "Complainant's Exhibit Copyrighted Painting" is executed in water colors and is a work of art—qualities which equally characterize designs for numerous articles of manufacture—it possesses none of the other earmarks of a painting, is without value as an original, was not intended for exhibition, has been preserved until the present day only to serve the purpose of an exhibit in the case, and was intended to produce a pleasing effect only when reproduced in repeats as a surface ornamentation for an article of manufacture—*all qualities inherent in a design for an article of manufacture.* It is further clear, by undisputed testimony, that it can be identified as a design for an article of manufacture by *mere inspection.* And finally it is admitted by the designer and the party who commissioned him to design it, that *it is a design for an article of manufacture, as a matter of fact.*

We submit, therefore, that the Court cannot, consistently with the evidence, hold that it is anything else.*

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* The argument that because the copyright statute specifically mentions, in section 4962, such articles as designs for molded decorative articles, plaques, etc., therefore the statute contemplates copyrighting designs for articles of manufacture, is very misleading. These specifically enumerated articles come under the head of "models or designs intended to be perfected as a work of the *fine* arts" mentioned in the same section.

It is not claimed that appellant's design belongs

We have already submitted our view that Congress, in enacting the design patent law and the copyright law, meant to draw a hard and fast line between those artistic productions intended for the fine arts and those intended for the useful arts, leaving no room for the existence of any "zone of neutrality" between the two or for the existence of any right to "elect" in any given case between the two modes of protection. We shall now show this must be so by reason of the radically different rights, remedies and proceedings under the two laws. We shall also show that both the Patent Office and the Copyright Office have recognized this clear line of demarkation and will not knowingly afford one kind of protection for subject-matter for which the law has provided an entirely different kind of protection.

The copyright law provides merely for registration of titles and deposit of copies of the thing sought to be copyrighted and provides for no examination as to novelty or validity. The law merely provides (Sec. 4952) that the author, etc., of any book, etc., shall, "upon complying with the provisions of this chapter" have the sole liberty of printing, etc.; and compliance with the formalities prescribed creates no presumption of novelty or validity. The design patent law provides for examination as to novelty and validity, and no creation that is not the valid subject of a patent and that has not been determined after investigation to be

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to this class. If it *does* belong to this class, then appellant's design is not a "painting" and the copyright is just as certainly void, for the reason that, under the law under which this suit is brought, an error in classification invalidates the copyright. To correct this condition, the new Act of July 1, 1909, provides (Sec. 5) that an error in classification shall not invalidate a copyright secured under the new act; but this provision is, of course, not applicable to the copyright in suit.

new, can be patented. A design patent, therefore, is presumptively valid.

The copyright law provides for the payment of a nominal fee of *fifty cents* for registration (Sec. 4958). The patent law provides for the payment of fees varying from *ten to thirty dollars* dependent upon the term for which protection is desired.

A copyright is granted for *twenty-eight years* and may be extended for a total term of *forty-two years* (Secs. 4953, 4954). A design patent is granted for *three and one-half, seven, or fourteen years*, as the applicant elects. The difference in length of term is due to the inherent differences between a literary production or work of the fine arts and a design for a manufactured article; the one, if meritorious, being in its nature enduring, while the other is relatively evanescent.

The law makes infringement of a copyright a *penal offense*, and, in the case of a painting, provides a penalty of $10,000 for publishing one thousand copies (Sec. 4965). Infringement of a design patent is merely a *civil injury*, and no damages in excess of $250 may be recovered unless proved.

A copyright registrant need not make oath of authorship or proprietorship. An applicant for a design patent must swear that he is the first, original and sole inventor.

Briefly, the copyright law seeks to promote the progress of literature and the *fine* arts, while the patent law seeks to promote the progress of the *useful* arts. Congress has seen fit to give to the owners of copyrights far cheaper and more extended protection, and far more substantial relief for invasion of the monopoly, than it has extended to owners of design patents. Into the reasons for the radical distinctions that the law makes we need not inquire, but certainly such distinctions make it incumbent upon the courts

to see to it that a complainant is not afforded the more comprehensive rights and remedies of the copyright law when his creation is such as to entitle him only to the more restricted rights and remedies of the design patent law.

It must be clear to the Court that if any commercial design, the original of which is painted or drawn, but adapted and intended exclusively or primarily for reproduction and in its reproduced form for application to an article of manufacture, may be lawfully arbitrarily called a "painting" because it is physically capable of being surrounded by a frame and hung upon a wall, then the copyright law is free to be perverted to uses not intended by Congress. Designs which heretofore have received the restricted protection by patent which the law contemplates, will hereafter secure protection by copyright, because of the trivial cost of the latter, its longer term, the far greater recovery in money for which its penal clause provides, the absence of preliminary examination, and the other enormous advantages which the copyright law affords.*

It is submitted, finally, that it is contrary to the policy of the law to enlarge the domain of any monopoly beyond those bounds to which, by long interpretation of the departments of the Government having

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* The evidence of Heylman (Q. 8, p. 97), shows that thousands of patents are now extant for designs for carpets, rugs, wall paper, box paper, etc., the originals of which are indistinguishable in character from the subject-matter of appellant's copyright. If the court upholds the copyrightable character of appellant's design, the established practice of protecting such designs will be revolutionized. Naturally the designer will "elect to copyright them, and the result will be a flood of copyrights for designs which the law intended should not receive such protection.

supervision thereof, it has been heretofore confined. This brings us to a consideration of the interpretation of the patent and copyright statute governing the practice both in the Patent Office and the Copyright Office. The attitude of these departments, which we shall show has been consistently in harmony with our contentions, is of course not binding upon the courts. But the interpretation of the law by these departments, in the exercise of such of its functions as are judicial in character, is certainly not to be ignored, and just as certainly should not be disturbed unless it is clearly erroneous.

It is clear, in the first place, that it is customary in the Patent Office to extend patent protection to designs of the general character of complainant's design. The Patent Office contains numerous patents for designs embracing *inter alia*, the following main classes (*Heylmun*, Q. 8, p. 97):

"Paper Manufacture," including designs for the surface ornamentation of *box covering paper, wrapping paper, wall paper* (embracing *between five and six hundred patents*), etc.

"Weaving Carpets," comprising mainly designs for the surface ornamentation of *carpets* and including about *four or five thousand patents*.

"Weaving Fabrics," comprising designs for the surface ornamentation of *rugs, table cloths, towels, bed quilts, curtains* and *shawls*.

"Printing," including designs for *dress goods, ribbons* and *all woven fabrics* upon which the design is printed, as distinguished from being woven.

"Packing and Storing Vessels," in which are to be found several designs for the *surface ornamentation of boxes*.

"Advertising," including designs for labels, cigar bands and paper sheets for application to cigar boxes.

A large proportion of the foregoing designs are, like the appellant's design, intended to be repeated with matching edges and corners (Q. 10).

A number of copies of design patents, typical of those referred to by Mr. Heylmun, have been offered in evidence and marked "Defendant's Exhibit Copies of Typical Design Patents."

Further, appellee's design, alleged to infringe appellant's copyrighted painting, has been patented and the same is offered in evidence and marked "Defendant's Exhibit, Defendant's Design Patent" (p. 170).

It is therefore established that it is the settled practice of the Patent Office to grant design patents for designs of precisely the character of "Complainant's Exhibit Copyrighted Painting."

Against the practice of the Patent Office cannot be offset the practice of the Copyright Office in recording the title or description of appellant's design and other designs of like character. A patent is a formal grant of a monopoly. A copyright certificate merely records a claim. The Patent Office must pass upon the right of an applicant to a patent. The Copyright Office is bound to enter or register the title of any thing that is submitted to it, provided it is designated as one of the lawful subjects of copyright and the application is made in due form of law. The entry, therefore, of an alleged copyright creates in and of itself not the slightest presumption of validity nor the slightest presumption of the copyrightable character of the thing entered. As was stated in *Osgood v. Aloe Instrument Co.*, 83 Fed. Rep. 470:

> "Unlike the laws governing the issue of patents to inventors, no certificate is made by the government conferring a copyright upon authors. They therefore have no grant conferring upon

them, in terms, a monopoly in or to their productions, and therefore have nothing to show a *prima facie* case, like that which arises in a suit for the infringement of letters patent, upon the production of the patent itself."

Yet even the Copyright Office refuses to register designs for box paper or any other similar article of manufacture if the application for registry discloses the true nature of the design.

In the official publication of the Library of Congress, Copyright Office, entitled "Bulletin No. 2, Directions for the Registry of Copyrights," appears the following:

> "The following articles frequently applied for are *not* subject to copyright registration under the copyright law and decisions of the courts."

Among the articles enumerated are "*box covers.*"

In further illustration of the practice of the Register of Copyrights in refusing to register designs for box paper, wall paper and the like, we call attention to the testimony of *Harry C. Kessler, Jr.*, the treasurer of the appellee company, in which his unsuccessful attempt to do so is detailed and his correspondence with the Register fully set out in his answer to question 3 (p. 90). Mr. Kessler first wrote the following letter:

> "Will you please send us the proper blank forms to be used in copyrighting a fancy box-paper, and oblige?"

To which the Register replied as follows:

> "I beg to state in response to your letter of November 25th, that a 'fancy paper-box'* *would*

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* The Register means "fancy box-paper," which was the subject of the application. See preceding letter of inquiry.

not be subject to protection through registration in this office. See circular 27. Possibly the desired protection could be secured through some action on the part of the Patent Office. See circulars 11 and 24. For any more definite information you should address the Commissioner of Patents."

He then addressed the following letter to the Register:

"Will you please send us the proper blank form to be used for registering a wall paper design, and oblige?"

To which the Register replied:

"I have the honor, by request of the Librarian of Congress, to acknowledge the receipt of your letter of December 1, 1905.

"In reply, I beg to state that a *design for an article of manufacture*, such as 'wall paper,' would *not be subject to registration in this office.* See circular 27.

"Section 4929 of the Revised Statutes provides that *whoever invents a new and ornamental design for an article of manufacture may obtain a patent therefor.* For any information respecting patents you should address the Commissioner of Patents. See circular 23."

Mr. Kessler then testifies as follows:

"Later I made another attempt to copyright a fancy paper; the design in this case was holly and mistletoe of the same general character as 'Complainant's Copyrighted Painting.' I made application, on one of the regular forms, for protection as a lithograph."

To this application, the following reply was received from the Register of Copyrights:

"I have the honor, by request of the Librarian of Congress, to acknowledge the receipt of your

application for entry of a lithograph entitled 'Holly and Mistletoe.' The copies of your work received at this office *appear to be in the nature of patterns for wall paper or box covering.*

"The statutes provide that the only lithographs subject to entry in this office are pictorial illustrations, such as the illustrations of a book, and *works of the fine arts, such as would be prized for their artistic value alone.* Your work would hardly appear to be embraced by the term as used in the statute.

"Entry as applied for not appearing permissible, your remittance of fifty cents is herewith returned in the original money order."

Of equal significance is the testimony of Mr. Heylmun. During the taking of appellant's testimony, complainant saw fit to offer in evidence a number of sheets of box paper, most of them marked copyright. At our request Mr. Heylmun made an investigation at the Copyright Office to determine whether the subject-matter of the sheets had been registered. Mr. Heylmun testifies as follows (Q. 3, p. 96):

"As requested, I made this investigation at the Copyright Office and there, together with one of the officials, made a search through the records of registrations and found at that time entries which seemed to refer to but two of the samples which were sent me, one of them being the automobile design and the other the violet design. I then advised Messrs. Harding & Harding as to the result of this investigation and filed a request with the Copright Office for an extended investigation in order to make sure that the investigation above referred to was accurate. In response to my request I received from the Copyright Office a letter, which I herewith produce, this letter being subsequently forwarded by me to Messrs. Harding & Harding."

This letter, offered in evidence as "Defendant's Exhibit Letter from Register of Copyrights of January 14, 1909," reads, in part, as follows:

> "The sheets you sent, however, seem rather *designs for wall paper or box paper*, and as such would be *protectable under Revised Statutes, Section 4929, rather than under the copyright law.*"

Notwithstanding, therefore, the admitted existence of examples of entries in the Copyright Office of things that are in reality designs for articles of manufacture and therefore protectable only under the provisions of the design patent law, it is clear that both the Patent Office and the Copyright Office recognize the clear line of demarkation between designs for articles of manufacture and (in the language of the Register) "works of the fine arts, such as would be prized for their artistic value alone," and that *both the Patent Office and the Copyright Office are in accord in classifying things of the precise character of "Complainant's Exhibit Copyrighted Painting" as proper subject-matter for design patents and as improper subject-matter for copyright protection.*

It is submitted, in conclusion on this point, that appellant's design is not a "painting" in the sense of the copyright law, notwithstanding its possession of artistic merit or of any degree of artistic merit; that it was capable of producing its intended effect upon the eye only by reproduction in repeat form, and was originated solely with a view to its reproduction in repeat form and its application in such form to an article of manufacture; that it is therefore a design for an article of manufacture and nothing else; that it is therefore protectable only under the design patent law; that the owner could not *elect* to protect it under any other law; and that appellant's copyright is therefore void.

If Appellant's Design Were a Work of the Fine Arts and Not a Design for an Article of Manufacture, or if, as the Circuit Court Held, the Designer Could Elect Between Copyright Protection and Patent Protection, Appellant's Design Would Not be Copyrightable as a "Painting," But Only as a Lithograph or Chromo, and the Error in Classification Invalidates the Copyright.*

It is admitted that appellant's design was produced as the first step in the production of sheets of paper containing lithographic copies of the design arranged in repeats.

Mr. *duMond* admits (XQs. 18-19-29, pp. 16-17) that it is evident from an inspection of "Complainant's Exhibit Copyrighted Painting" that it was intended for reproduction, by lithography or some process, in multiple upon sheets with matching edges and corners. He also admits (XQ. 22, p. 17) that "If a repeat design were to be reproduced upon sheets containing many repeats and the objects were the sheets, he should make his design accordingly."

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* The word "chromo" is mentioned in Section 4952 of the Revised Statutes, which enumerates the articles subject to copyright. A lithograph is merely a synonym for a chromo and is grouped with a chromo as copyrightable subject-matter in other sections of the copyright statute and in application blanks furnished by the Register of Copyrights. (See page 6 of Bulletin No. 2, Directions for the Registrations of Copyrights.) Both terms cover matter printed from drawings on stone. See also Information Circular No. 27.

Under the law in force at the date of appellant's copyright, any error in classification invalidated a copyright. To correct this condition, the Act of July 1, 1909, provides that an error in classification shall not invalidate a copyright secured under the new act.

Mr. *Low* also admits (XQ. 25, p. 23) that inspection of "Complainant's Exhibit Copyrighted Painting" shows that it was intended for reproduction.

Mr. *Muendel*, appellant's designer, admits (XQ. 27, p. 29) that he drew the design so that when reproduced in multiple by lithography, "the top and bottom edges as well as the two side edges matched or merged into each other."

> "Because the order called for a fancy paper sketch, and by that is meant a sketch that can be carried along indefinitely by simply reproducing the same thing and placing them side by side."

Mr. *Frazier*, who gave the order for appellant's design, admits, as we have hereinbefore pointed out, that "it was produced especially to provide an artistic and attractive paper," etc., and that, after the "Copyrighted Painting" was delivered, "We proceeded at once to reproduce the painting by lithography."

Practically all of appellee's witnesses testify that they can tell from inspection that the original design was made with a view of reproduction in repeat form, on sheets of paper. Mr. *Scherr* states (Q. 14, p. 88) that, in the case of such a design, the

> "main effort is to make a sketch that will look well in repeat and finishes the edges of a design as well as other parts, so in repeating it will form a design as a whole, and its value is in the repeat forming the picture."

Whereas in

> "a painting the picture is finished without regard to repeats and it is something beautiful in itself."

Now, in view of the foregoing evidence (assuming that it is a work of the fine arts and not a design for an article of manufacture), is appellant's design a "painting," or is it a "lithograph" or "chromo," in the eye of the copyright law?

The fact that the original of the lithograph is painted or drawn is, of course, of no significance, for *the original of every chromo or lithograph must be painted or drawn.*

The question whether any particular picture is a painting or a chromo or a lithograph must therefore depend upon whether the same was primarily or exclusively intended for reproduction by lithography and whether it was drawn in such a way as to enable its intended ultimate artistic effect to be produced when so reproduced.

Applying this test, appellant's design cannot be other than a lithograph or chromo. If it is that, it cannot be also a painting. The law certainly does not contemplate the copyrighting of any copyrightable subject *twice* as two different things with respect to which the law contains radically different provisions.

In the case of a chromo or lithograph, the law requires, for the protection of home industry, that the copies of the same required to be deposited with the Register of Copyrights shall be printed on drawings from stone made within the limits of the United States, and the importation of any such copyrighted lithographs, or drawings thereof on stone, is prohibited. (Sec. 4956 R. S.)

There are no such requirements relating to paintings.

For infringement of a painting, the law provides a penalty of *ten dollars for every copy found in the infringer's possession, or by him sold or exposed for sale.* In the case of chromos or lithographs, the law imposes a penalty of *one dollar for every sheet of the same found in his possession.* (Sec. 4965 R. S.)

If the designer or proprietor of a chromo or lithograph could resort to the subterfuge of copyrighting the original design for a chromo or lithograph as a "painting," he could avoid the provisions of the law

as to importation and recover penalties far in excess of those contemplated by law. For instance, in the present case, but *one dollar* could be recovered for a *single sheet* in the case of a copyright for a *chromo or lithograph*, while in the case of a copyright for a *painting*, it might be contended that *three hundred and twenty dollars* could be recovered for a *single sheet*, as each sheet of defendant's design contains thirty-two repeats of the design.

If the courts would uphold an appellant in such a subterfuge, the provisions of the copyright law relating to chromos and lithographs would be rendered practically nugatory. No one thereafter would be foolish enough to copyright a chromo or lithograph as such when, by copyrighting the indispensable original design therefor as a *painting*, he could avoid the provisions of the law as to importation and recover much greater amounts in penalties.

We, of course, do not mean to say that a painting that is in fact a painting cannot be copyrighted as a painting merely because it may subsequently be reproduced as a lithograph. That is not the condition in the present case.

What we do mean to say is that a design or picture that is particularly adapted for and originated solely for the purpose of reproduction in multiple by lithography was, under the law in force at the date of complainant's copyright, copyrightable (if copyrightable at all) only as a chromo or lithograph, and was not copyrightable as something which it is not, namely, a painting.

Under the present law that went into effect July 1, 1909, it is provided (Sec. 5): "nor shall any error in classification invalidate or impair the copyright protection secured under this act." This provision is, of course, not retroactive, and it is not intended or stated to be, but was to cure the defect in the previous

law in force at the date of appellant's copyright, under which law an error in classification, such as that undoubtedly made by appellant (under the assumption that his design was copyrightable), invalidated the copyright.

Appellant's design, therefore, is *not a painting*, whether it be regarded as a work of the fine arts or as a design for an article of manufacture, and therefore his copyright in invalid.

Even if Appellant's Copyright Were Valid, Appellee Has Not Infringed It.

This proposition is, we believe, wholly unnecessary for us to establish. It would be necessary to convince the Court of the non-identity of appellant's and appellee's designs only if appellant's design were copyrightable, and copyrightable as a painting, and provided the appellant had marked each copy copyrighted.

The proposition, however, is not irrelevant, because in and of itself it constitutes an absolute defence.

Section 4965 of the Copyright Law, in force at the date of the alleged infringement, reads as follows:

> "Sec. 4965. If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this act, shall, within the term limited, contrary to the provisions of this act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, dramatize, translate, or import, *either in whole or in part, or by varying the main design, with intent to evade the law*, or, knowing the same to be so printed,

published, dramatized, translated, or imported, shall sell or expose to sale, any copy of such map or other article, as aforesaid, he shall . . ."

Then follows an enumeration of the penalties.

It will be seen, therefore, that appellant must establish, to the satisfaction of the Court, that appellee had copied complainant's design "either in whole or in part, or by varying the main design, with intent to evade the law."

Of course, if an alleged infringement is a Chinese copy of the copyrighted article, or if any substantial part of the alleged infringement is a Chinese copy of any substantial part of the copyrighted article, intent to evade the law might be presumed. No such condition, however, exists in the present case, as there is not a single leaf, berry or branch, or any detail large or small, of appellant's design that has been reproduced in appellee's design; and therefore the burden of establishing that degree of substantial identity that would support the charge of infringement is upon the appellant, who must prove it by satisfactory and convincing evidence; or else the Court must be satisfied of such necessary degree of substantial identity by inspection and comparison.

It can hardly be contended that the appellant has established infringement by a preponderance of evidence; for the evidence adduced by appellee to rebut the charge of infringement is at least as weighty as that adduced by appellant in support of it. The Court, therefore, must be the ultimate judge, and will be little aided by argument of counsel.

It may be well, however, at the outset, to discuss the rule governing the determination of the question of infringement of a copyright. This rule, if it may be so called, is set forth in various decisions; and we assume that the chief difference between appellant and

appellee will not be what test shall be applied to resolve the question, but whether the application of an acknowledged test will or will not sustain the infringement charge.

One of the leading cases is *Springer Lithographing Co. v. Falk,* 59 Fed. Rep. 707, in which the Circuit Court of Appeals approved the charge of the Circuit Court. This case was cited in appellant's brief in this suit on the preliminary injunction motion. The following is a copy of all of that part of the opinion relating to the matters under discussion:

> "4. It is further assigned as error that the Court refused to charge, as requested by defendant: 'To be an infringement of plaintiff's photographs, the defendant's lithograph must be substantially a copy of it—that is, that the two are substantially identical.' The Court charged the jury that the only question before them was 'whether these lithographs are copies or substantial copies, or whether the ideas, pose, and characteristics of the original photographs were substantially reproduced by the defendant. It is not necessary that the copies should be Chinese copies. You will observe that the statute says: "If the infringer shall copy, either in whole or in part, or by varying the main design with intent to evade the law." As I said, it is not necessary that the copies should be exact copies. It is necessary that the infringer should appropriate a substantial portion of the distinctive ideas and characteristic features of the original photographs to make up its lithographs. . . . Did the lithographs contain the main design, the substantial ideas, the distinctive characteristics of the original photograph, only so far varied as to intend to evade the law without actual evasion? . . . If defendants have reproduced, in substance and effect, the general characteristics of the original, though some minor particulars are intentionally avoided, then there is an infringement.'

> "This was all the defendant was entitled to, and the exception to a refusal to charge as requested is unsound."

In *Falk v. Donaldson*, 57 Fed. Rep. 35 (also quoted by appellant in its brief on preliminary injunction motion in this suit), Judge Townsend held that the rule for determining the question of infringement of a copyright was akin to that for determining the question of infringement of a design patent.

In *Root v. Ball*, 4 McLean, 177 (also cited in appellant's brief on the preliminary injunction motion in this case), it was held, in respect of a design patent, that

> "To infringe a patent right, it is not necessary that the thing patented should be adopted in every particular; but if, as in the present case, the design and figures were substantially adopted by the defendant, they have infringed the plaintiff's right. . . . And in a case like the present, where ornaments are used for a stove, it is an infringement to adopt the design so as to produce, substantially, the same appearance."

In *Ripley v. Elson Glass Co.*, 49 Fed. Rep. 927 (also cited in appellant's brief on preliminary injunction motion in this case), the Court, following *Gorham v. White*, 14 Wall. 528, held that

> "In determining whether a design patent is infringed, the test is whether there is a substantial similarity in appearance; not to the eye of the *expert*, but to that of the *ordinary observer*, giving such attention as would ordinarily be given by a purchaser of the article bearing the design."

And in *Falk v. Donaldson, supra*, Judge Townsend expressly held that *testimony of an expert character* was not admissible on the question of infringement (p. 35).

Bearing these principles in mind, let us compare appellant's design with the alleged infringing design. At the outset, it may freely be conceded that there is a general similarity of the two designs *arising from the similarity of the subject-matter*. That is, both designs consist of holly and mistletoe interspersed with the branches of trees—in appellant's design, spruce; and in appellee's design, pine. But it will hardly be contended by appellant—and certainly such a contention would be preposterous—that appellant by his copyright has the exclusive right to paint these elements of nature upon canvas or reproduce them upon wrapping paper. As appellant's witness *DuMond* says (Q. 12, p. 21):

> "The holly berries, mistletoe and all the constituent parts of this design have been used many times as appropriate symbols for Christmas designs, and will be used indefinitely for the same purpose."

It may be further conceded that, in general, the coloring is the same. That is, the branches are brown, the leaves are green, the mistletoe berries are white, and the holly berries are red. But these qualities, too, are not matters of original conception, but are inherent in the subject-matter. Any essential variation from nature with regard to the shape and color of the leaves, berries, and branches would make the design an absurdity and place it on a par with the traditional juvenile picture of a purple cow eating red grass.

The question of infringement cannot, therefore, be judged by these general resemblances from which the designers could not escape if they would, but from the details, the configuration and arrangement of the clusters, the configuration and arrangement of the tree branches, the amount and distribution of the background, and, finally, the general effect dissociated from the identity of the natural elements portrayed.

Now it is clear that in each and every detail, in the configuration and arrangement of the clusters of holly and mistletoe and of the tree branches, and in the amount and distribution of the background, the two designs are utterly unlike, and that there is absolutely no similarity in general effect aside from that produced by the identity of the natural elements portrayed.

We feel that the Court must be and will be so impressed upon comparison of the two designs.

It may be helpful, however, for the Court to consider the evidence. And here, we think, appellee's case greatly outweighs that of appellant.

The first two witnesses produced by appellant are Mr. *DuMond* and Mr. *Low*, both artists of standing and doubtless well qualified to talk in an instructive and entertaining manner upon matters artistic. But both of these gentlemen are *paid experts* whose testimony should certainly not be given more weight than that usually accorded to witnesses of this class. Indeed, we submit that their evidence is of little if any value; for if complainant's design is really a "painting" then these men, who are professed experts in the art and dissert very learnedly and at length upon "spacing" and "massing" and "balance" and "juxtaposition" and "grey lights' and "warm and cool reflections" and "the scale of lower and higher colors" and "melody akin to verse and music," etc., etc., etc.—are hardly qualified to testify at all, in accordance with the rule laid down in *Ripley v. Elson Glass Co., supra* and *Falk v. Donaldson, supra*. Accordingly their testimony with respect to infringement was objected to by appellee on this ground. (See objection to Q. 11, DuMond, and to Q. 13, Low.)

Mr. *DuMond* says defendant's design is a "plagiarism" of complainant's design and of greatly inferior merit (Q. 11, p. 14), but points out no resemblances

either of a general or specific character. He admits that if he had seen appellant's design first and at a later date appellee's design, *he would not have confused the two* (XQ. 23, p. 17).

Mr. *Low* finds that the two designs are "substantially identical, with certain differences that are only evident upon closer examination," but he, too, points out no resemblances of a general or specific character.

It is evident that appellant cannot rest its case upon the testimony of these "experts."

Mr. *Frazier*, who, acting for the appellant, commissioned Mr. Muendel to make appellant's design, Mr. *Bailey*, a lithographer, and Mr. *James*, an employe of appellant for over twenty-five years (Q. 1-3, p. 68), are the only remaining witnesses of the many called by appellant who gave any testimony favorable to the charge of infringement. Only one of these witnesses (Mr. Bailey) is not identified with the appellant company. None of them gives any reasons for his expressed opinion that the two designs resemble each other, nor points out any general or specific resemblances.

The testimony of Mr. Bailey, who is the sole witness for appellant who is not either a painter by profession or identified with the appellant corporation, is at least neutralized by the testimony of Mr. Petre, a lithographer, who testified for appellant as follows (Q. 8, p. 39):

> "Q. 8. From such experience as you have had in making comparisons between original designs and lithographed reproductions therefor, please state whether or not in your opinion the lithographed sheet now shown you marked 'Exhibit Defendant's Product' represents and embodies the design and picture shown in the framed picture, also shown you, marked 'Complainant's Exhibit Copyrighted Painting'?
>
> "A. It is not the same as this."

While appellant produced a large number of witnesses not professional painters and not identified with the appellant corporation, none of them was asked to express any opinion upon the question of the resemblance between appellant's and appellee's designs, although all of them, being "general observers," were qualified to testify.

Every one of appellee's witnesses, however (except those identified with the appellee corporation), although testifying to other matters, were asked to express an opinion as to the similarity or dissimilarity of the two designs and all without exception stated unqualifiedly that the designs are entirely different.

George A. Sook testified as follows (p. 80):

"Q. 10. I will now ask you to compare the two exhibits heretofore handed you, namely, 'Complainant's Exhibit Copyrighted Painting' and 'Exhibit Defendant's Product' and ask you to state whether, in your opinion, the two designs shown you are substantially the same, or substantially different?

"A. *The only similarity I detect is that both products employ holly, mistletoe and pine*, otherwise, the designs differ materially.

"Q. 11. Are you of the opinion that if you had first seen one of these designs, and paid some attention to it, and had afterwards seen the other, that you would mistake it for the first?

"A. No."

William Gosewisch testified as follows (p. 83):

"Q. 13. Please compare the exhibit handed you, namely, 'Complainant's Exhibit Copyrighted Painting' with the sheet of box paper, marked 'Exhibit Defendant's Product,' and state whether, in your opinion, the two designs shown you are substantially the same, or substantially different?

"A. I consider them *entirely different*.

"Q. 14. In general effect or in detail?

"A. Both; especially in detail they are different.

"Q. 15. In what respect, if any, are they similar?

"A. *The only similarity I see is that they are both holly and mistletoe designs.* That is the only similarity I can see."

Horace Bowman testified as follows (p. 85):

"Q. 14. Please compare the exhibit handed you, namely, 'Complainant's Exhibit Copyrighted Painting,' with the sheet of box paper marked 'Exhibit Defendant's Product,' and state whether in your opinion, the two designs shown you are substantially the same, or substantially different?

"A. *Substantially different.*

"Q. 15. In general effect or in detail?

"A. Both."

Henry S. C. Bacon testified as follows (p. 86):

"Q. 5. Will you please compare what I have handed you with the sheet of box paper marked "Exhibit Defendant5s Product,' and state whether or not, in your opinion, the two designs, respectively shown therein, are substantially the same or substantially different?

"A. I would not hesitate to say that they are *substantially different*, inasmuch as they are both supposed to represent holly and mistletoe. *I can't see any similarity of design.*"

Walter P. Miller testified as follows (p. 89):

"Q. 5. Will you please examine the two exhibits that are before you, one in a frame, marked 'Complainant's Exhibit Copyrighted Painting,' and the other a sheet of box paper marked 'Exhibit Defendant's Product,' and state whether, in your opinion, the two designs respectively embodied in the two exhibits are substantially the same or substantially different?

"A. No, I should say that they are *very different.*

"Q. 6. Would you be able to handle both of these designs as applied to box paper in your business, or do you think you could handle only one of them?

"A. I think I could handle both of them.

"Q. 7. Do you think either one would be preferred to the other by any particular class of customers?

"A. Yes, I think that the beautiful way that this mistletoe is brought out in the 'Exhibit Copyrighted Painting' would appeal to a certain class, that the other, the 'Defendant's Product,' wouldn't. For instance, referring to 'Copyrighted Painting' made up into a candy box, it would have a sentimental value to the young lady who might receive it. In the other exhibit, I should think that it would be more attractive by reason of the brightness of the berry, and would, for instance, be very suitable for department store work. There is one other thing that strikes me in the 'Exhibit Defendant's Product,' and that is the background is better filled and makes a closer design, particularly for the class of work mentioned above. To make my view of the matter a little clearer, I would say that I can just picture the beautiful mistletoe design of this 'Exhibit Copyrighted Painting,' on the top of a candy box, and how well it would make up for that purpose. In the other exhibit, I can see the paper used on, say, a handkerchief box that requires a close pattern and bright and snappy, which seems to be the attractiveness as brought out by the bunching of the red berries. I say that in explanation of what I said previously."

Jacob B. Shaut testified as follows (p. 93):

"Q. 7. Please compare the exhibit that I have shown you 'Complainant's Exhibit Copyrighted Painting' with the design embodied in the sheet of box paper marked 'Exhibit Defendant's Product,' and state, whether, in your opinion, the two designs are substantially the same or substantially different?

"A. First, *there is no comparison in the two.* One 'Copyrighted Painting' being in the nature of a design more like holly bud with an ordinary pine effect. Now in reference to the other ('Defendant's Product') design, it is of different style and character of a holly bud intermingled with more of a palm leaf, the background being of a plain white nature intermingled with acorns, which the other has no style of character of the kind, being more open in design and pattern. Therefore, I see no comparison in the two designs as a work of art, the two being diametrically in design different."

Frank Green testified as follows (p. 104):

"Q. 11. I ask you to compare the design of 'Complainant's Exhibit Defendant's Product,' and 'Complainant's Exhibit Copyrighted Painting' with the sheet of box paper marked 'Complainant's Exhibit Defendant's Product,' and ask you to state whether, in your opinion, the two designs are substantially the same or substantially different.

"A. So many designs have totally different features on being reproduced that—I will put it this way—many designs have features that are hidden when only one repeat is shown. I think that covers it.

"*The only likeness I see is in the use of holly and mistletoe.* The uses of the holly and mistletoe, as far as I can see, are *totally different* from the first exhibit.

"Q. 12. In view of the first part of your last answer I will ask you to compare 'Complainant's Exhibit Defendant's Product' with 'Defendant's Exhibit Sheet of Complainant's Box Paper No. 1' and state whether the two designs embodied therein are substantially the same or substantially different?

"A. In the defendant's design I find that the use of the stems of the pine forms a square, a feature not seen in the complainant's design. Also the pine cones is a feature not seen in the com-

plainant's design. I find the grouping altogether, and the total effect quite distinct. I could go into minor details, but *everything is quite different.*

"Q. 13. Apart from the similarity of the subject matter, namely, the use of holly and mistletoe, to which you have referred in your answer to Q. 11, what, if any, parts of the two designs, do you find to be alike? I refer to 'Complainant's Exhibit Copyrighted Painting' and 'Complainant's Exhibit Defendant's Product.'

"A. *I do not see similarity even in a leaf. I see no two features alike.*"

From the above testimony it will be seen that all of the witnesses agree that the only similarity that exists is in the subject-matter; that any one paying some attention to the designs would never mistake one for the other; that they are entirely different in general effect and in detail; that they would even appeal respectively to different classes of customers and be best adapted respectively to two different specific purposes; and that they are wholly unlike in grouping, general effect, and in each and every minor detail.

It is simply impossible to conceive of any stronger testimony of dissimilarity with respect to two designs embodying a common subject.

Counsel for appellant seemed to think it advantageous to his case to force the witness to point out dissimilarities in detail, presumably for the purpose of enabling him to argue that what was not pointed out specifically as dissimilar would have to be conceded as similar. But the Court must appreciate that if it is appellant's contention that appellee's design is, in the language of the statute, a "copy . . . in part" of appellant's design, the burden is upon appellant to point out such copied parts, and that the existence, without identification, of copied parts cannot be established by mere arguments based on the doctrine

of exclusion. Such cross-examination, however, not only failed to help appellant, but greatly reinforced the direct testimony; for it developed the fact that the substantial differences between the two designs are so numerous that no two witnesses mentioned the same differences.

Sook pointed out the difference in density of the masses, the greater intertwining of the tree branches in appellee's design and the conspicuousness in the latter of the numerous pine cones (XQ. 13).

Gosewisch mentioned the different placing in appellee's design of the leaves, the different location of the holly berries, the difference in the mistletoe and its location, and the presence in appellee's design of the pine cones and the pine needles, together with differences in style and color (XQ. 16).

Bowman pointed out the differences in number, size and arrangement of the several masses; the fact that in appellant's design the mistletoe was kept more separate from the holly than in appellee's design; the fact that the spruce in appellant's design was worked as a connecting link between the masses, while in the appellee's design the pine branched out from each mass; that no two leaves were alike; that the red holly berries and the white mistletoe berries were each different in design and shade of color; that branches, stems, needles and cones of the pine of appellee's design differed from the spruce of appellant's design in various specified ways (XQ. 17).

Bacon referred to the difference in numbers of clusters; to the different appearance of the pine in appellee's design and the spruce in appellant's design; to the comparative fullness of appellee's design and the comparative absence of background therein; and to the differences in the shadings and edgings of the leaves; these differences being, in his view, the "most noticea-

ble," although he "could go into a great deal of detail" (XQs. 6, 7).

Miller's testimony has already been quoted in detail and he was not cross-examined.

Schaut's testimony has also been quoted and he could only add on cross-examination that he could see "no comparison in the two whatever."

Green's testimony has also been fully quoted, and he merely added in cross-examination, to the "principal" differences pointed out on direct, the substantial difference in appearance between the heavy spruce and the light pine; he having already stated that there were no two features alike.

In fact, if it were profitable to do so, thousands of differences might be enumerated.

We are fully aware that the presence of numerous differences, in and of itself, is not decisive to the question of infringement. Indeed, in *Falk v. Donaldson*, 57 Fed. Rep. 35, experts were able to suggest forty differences and yet the copyrighted photograph was held to be infringed. But the existence of admitted differences is nevertheless a relevant matter, especially where the opposing testimony suggests no resemblances. It would seem to dispose of any contention that appellee has appropriated a part, as distinguished from the whole, of the main design. The question whether appellee has, in the language of the statute, merely "varied the main design" of appellant is not, possibly, conclusively disposed of by proof of endless substantial differences in component features and of no identities in component features; but it would seem that this all-inclusive dissimilarity in component parts raises at least a presumption of difference in the general effect that would have to be overcome by the two designs convincingly appealing to the eye as being essentially the same in general effect. On this point, the weight of the testimony is equally strong, and indeed overwhelming, in appellee's favor.

After all, however, the Court must be the ultimate judge. If designs so totally different both in general effect and component features are to be held to be in substance the same, it is difficult to see why the result of such a holding will not be to grant appellant an exclusive right to portray clusters of holly, mistletoe and "Christmas-tree" foliage; for, if not, how could infringement be avoided except by departing from the limitations imposed by nature?

As is stated in the recent Supreme Court case of *White-Smith Music Co. v. Appollo Co.*, 209 U. S. 1 (17):

> "The statute is not provided for the protection of the *intellectual conception* apart from the thing produced, however meritorious such conception may be, but has provided for the making and filing of a *tangible thing*, against the publication and duplication of which it is the purpose of the statute to protect the composer."

Certainly appellant is not entitled to a monopoly of the intellectual conception of tree branches intertwined with clusters of holly and mistletoe, which is absolutely the only respect in which the two designs can be said to resemble each other.

In the case of *American Mutoscope & Biograph Co. v. Edison Manufacturing Co.*, 137 Fed. Rep. 262, both the complainant's and defendant's films contained several hundred films, and the camera was located at seven or eight different places, the first two or three of which were taken near to Grant's tomb, the remaining places being in some country district. To quote from the opinion:

> "In the first scene of each photograph General Grant's tomb is visible, and before it appears a man, who is soon met by several women, who crowd about him, and from whom he attempts to run away. In each of the photographs are successive scenes showing the man and the women

> running down the roadway leading from the tomb, and across fields and through hedges, and jumping over fences and down banks. The two photographs possess many similar and many dissimilar features."

The Court, however, pointed out that "the defendant's pictures were taken at times different from those of the complainant, and by securing a different set of actors, dressed in different costumes."

The Court was "not prepared to say, on the evidence now before me, that the defendant has appropriated the substance of any part of the complainant's copyright" and denied the injunction. The decision was based, in part, on the authority of *Munro v. Smith*, 42 Fed. Rep. 266, from which the Court quoted as follows:

> "That the defendants got the *idea* from the plaintiff of having a picture to represent the common hero of all the stories, an apparently old countryman, dressed in an old-fashioned garb and style, and having a shrewd face, is probably true. But the two pictures are dissimilar. The attitude, the general expression, and the general appearance of the two figures are unlike; and not only unlike, but very different. The variations are more than colorable. The defendant's picture is *not an imitation*, but their designer *took the plaintiff's idea, and worked it out in a different way.* I do not find an infringement, and the bill should be dismissed."

In *Dam v. La Shelle Co.*, 175 Fed. Rep. 907 (cited in appellant's brief), in which the Court held that a play that dramatized a copyrighted story was an infringement of the copyright, the Court also held:

> "It is undoubtedly true, as claimed by defendant, that an author cannot by a suggestion obtain exclusive control of a field of thought upon a particular subject. If the playwright in this case without the use of the story and working inde-

> pendently, had constructed a play embracing its *central idea*, it may well be that he would not have infringed the copyright of the story."

It might be, as in the foregoing cases (although there is not the slightest evidence to support it and it is denied), that appellee's designer got his "*idea*" or "*intellectual conception*" or "*central idea*" from appellant; but that does not make appellee's design an infringement in view of differences between the "tangible things" themselves that are certainly "more than colorable." It may be true (although denied by appellee) that appellee's designer "drew his inspiration and suggestion" from appellant's design, which Mr. Dumond avers; but every artist or designer has a right to draw "inspiration and suggestion" from what has gone before; subject to the qualification that he shall not merely *copy*.

We submit that appellee's designer has not "copied" the appellant's design "either in whole or in part, or by varying the main design, with intent to evade the law."

Conclusion.

It is submitted that the decree of the Circuit Court of Appeals for the Third Circuit should be affirmed, not only for the reasons set forth in its opinion, but also for each and all of the other reasons set forth in this brief.

Respectfully submitted,

FRANK S. BUSSER,
Of Counsel for Appellee.

APPENDIX.

Extracts From the Copyright Law in Force Before July 1, 1909.

Section 4952. The author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; . . .

In the construction of this act the words "engraving," "cut," and "print," shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office. And the Commissioner of Patents is hereby charged with the supervision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of prints, except that there shall be paid for recording the title of any print or label, not a trademark, six dollars, which shall cover the expense of furnishing a copy of the record, under the seal of the Commissioner of Patents, to the party entering the same.

Section 4953. Copyrights shall be granted for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed.

Section 4954. The author, inventor, or designer, if he be still living, or his widow or children, if he be

dead, shall have the same exclusive right continued for the further term of fourteen years, upon recording the title of the work or description of the article so secured a second time, and complying with all other regulations in regard to original copyrights, within six months before the expiration of the first term. . . .

Section 4956. No person shall be entitled to a copyright unless he shall, on or before the day of publication, in this or any foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or chromo, or a description of the painting, drawing, statue, statuary, or a model or design, for a work of the fine arts, for which he desires a copyright; nor unless he shall also, not later than the day of the publication thereof, in this or any foreign country, deliver at the office of the Librarian of Congress, at Washington, District of Columbia, or deposit in the mail, within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, two copies of such copyright book, map, chart, dramatic or musical composition, engraving, chromo, cut, print, or photograph, or in case of a painting, drawing, statue, model, or design for a work of the fine arts, a photograph of the same: Provided, That in the case of a book, photograph, chromo, or lithograph, the two copies of the same required to be delivered or deposited as above, shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom. During the existence of such copyright the importation into the United States of any book, chromo, lithograph, or photograph,

so copyrighted, or any edition or editions thereof, or any plates of the same not made from type set, negatives, or drawings on stone made within the limits of the United States, shall be, and is hereby prohibited, except in the cases specified in paragraphs 512 to 516, inclusive, in section two of the act entitled, an act to reduce the revenue and equalize the duties on imports and for other purposes, approved October 1, 1890; . . .

Section 4958. The Librarian of Congress shall receive from the persons to whom the services designated are rendered, the following fees: 1. For recording the title or description of any copyright book or other article, fifty cents. 2. For every copy under seal of such record actually given to the person claiming the copyright, or his assigns, fifty cents. . . .

Section 4962. No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page, or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz.: "Entered according to Act of Congress, in the year —— by A. B., in the office of the Librarian of Congress at Washington;" or, at his option, the word "Copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out, thus: "Copyright, 18—, by A. B."

That manufacturers of designs for molded decorative articles, tiles, plaques, or articles of pottery or metal subject to copyright may put the copyright mark prescribed by section forty-nine hundred and sixty-

two of the Revised Statutes, and acts additional thereto upon the back or bottom of such articles, or in such other place upon them as it has heretofore been usual for manufacturers of such articles to employ for the placing of manufacturers, merchants, and trademarks thereon.

Section 4965. If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this act, shall, within the term limited, contrary to the provisions of this act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, dramatize, translate or import either in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published, dramatized, translated or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale; Provided, however, That in case of any such infringement of the copyright of a photograph made from any object not a work of fine arts, the sum to be recovered in any action brought under the provisions of this section shall be not less than one hundred dollars, nor more than five thousand

dollars, and: Provided, further, That in case of any such infringement of the copyright of a painting drawing, statue, engraving, etching, print, or model or design for a work of the fine arts, or of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than two hundred and fifty dollars and not more than ten thousand dollars. One-half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States.